

BOARD OF TRADE

BANKRUPTCY ACTS, 1914 AND 1926
DEEDS OF ARRANGEMENT ACT, 1914

MINUTES OF EVIDENCE
TAKEN BEFORE
THE COMMITTEE ON
BANKRUPTCY LAW AND
DEEDS OF ARRANGEMENT LAW
AMENDMENT



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LETTER SENT TO CERTAIN ORGANISATIONS AND
INDIVIDUALS ON 2ND NOVEMBER, 1955

Board of Trade,
London, W.C.1.

2nd November, 1955.

Sir,

Bankruptcy Law Amendment Committee

The President of the Board of Trade has appointed a Committee under the Chairmanship of His Honour Judge Blagden, with the following terms of reference:-

"To consider and report what amendments are desirable in

- (1) the Bankruptcy Acts, 1914 and 1926, more particularly in regard to the provisions relating to the discharge of bankrupts; and
- (2) the Deeds of Arrangement Act, 1914."

2. The Committee would be glad to have your views generally on the questions involved in the terms of reference, and also on the particular matters set out below. They would appreciate in the first place a memorandum setting out your comments on these points; this can be supplemented later by oral evidence if you or the Committee so desire. It should be noted that any memorandum submitted may be published and it is assumed that you will have no objection to this course.

3. Matters upon which evidence is particularly desired are as follows:-

- (1) Whether, and if so, how the Bankruptcy Acts should be amended in regard to the discharge of bankrupts. Comments on the scheme outlined in the Appendix to this letter would be particularly appreciated.
- (2) In relation to a second or subsequent bankruptcy where the bankrupt remains undischarged from a previous bankruptcy, whether assets acquired by the bankrupt after his previous bankruptcy should be applied in discharging the debts owing to creditors in the second or subsequent bankruptcy in priority to any debts remaining owing in the prior bankruptcy.
- (3) The desirability of increasing the monetary limits prescribed by the Bankruptcy Acts so as to take account of the fall in the value of money, particularly those relating to a petitioning creditor's debt and to the estimated value of assets to enable an Order for Summary Administration to be obtained from the Court.
- (4) The advisability of limiting the vesting of after acquired property to such property as may be claimed by the trustees.
- (5) Whether creditors should be able to appoint the Official Receiver as trustee in a non summary case.
- (6) Whether provision should be made for a conclusion of the bankruptcy where the debts are paid in full (with statutory interest) and a re-vesting of the surplus in the bankrupt without the necessity for any documentary transfer by the trustee.
- (7) The enlargement of the provisions of Section 51 of the Bankruptcy Act, 1914 to cover all kinds of earnings including the wages of workmen.

(8) An amendment whereby all prosecutions for offences under the Bankruptcy Acts may be instituted and carried on by the Board of Trade in lieu of the Director of Public Prosecutions.

(9) With regard to Deeds of Arrangement, what provisions are desirable in order that there may be a more effective control by the Board of Trade over the administration of assets vested in a trustee under a Deed of Arrangement.

4. In addition to possible legislation on these points, there will necessarily be many other amendments of the Bankruptcy Acts and the Deeds of Arrangement Act which are considered desirable either to clarify questions of doubt or to facilitate administration in the light of experience over the past forty years and the Committee would appreciate suggestions relating to any such points of doubt or difficulty.

5. The Committee would be grateful if your views could be received by 20th December.

I am, Sir,
Your obedient Servant,
(Sgd.) B. MacTavish
(Joint Secretary)

APPENDIX

Scheme to Ensure that the Discharge of Every Bankrupt is Considered by the Court

The following scheme has been submitted for the consideration of the Committee:-

(a) At the end of a certain period (two years is suggested) after the conclusion of the Public Examination of the bankrupt, every bankrupt would become automatically discharged unless a caveat were entered on the Court file against such automatic discharge.

(b) This caveat would be entered at the conclusion of the Public Examination on the application of the Official Receiver; or of any creditor who had proved his debt and was present; or on the initiative of the Court. The Registrar would take into account the evidence of the bankrupt, as given in his answers at his Public Examination, and upon hearing the applicant for the caveat thereon, would decide whether the bankrupt's conduct and financial dealings leading to his bankruptcy were such as to render it undesirable in the public interest that the automatic discharge should take effect. In that event, the Court would enter the caveat and at the same time fix a day, time and place for the hearing of the bankrupt's discharge.

(c) Any bankrupt whose discharge was refused by the Court would be required to keep the Official Receiver informed of all changes of address, to account to the Official Receiver at the end of every six months as to all his financial transactions and any after acquired property or earnings and to attend upon the Official Receiver as and when required.

(d) If any bankrupt who had not a caveat entered against him were not satisfied to await the period when he became automatically discharged he would have the right to apply for an earlier discharge at any time after the conclusion of his Public Examination. In that event his application would be dealt with in the same manner as under the existing provisions of Section 26.

(e) Provision would be made for the automatic discharge of all existing undischarged bankrupts provided they had not been bankrupt on more than one occasion and the Court had not refused their discharge.

Scheme for Discharge of Bankrupts

In the course of its deliberations the Committee has evolved a modified form of the scheme for dealing with the problem of undischarged bankrupts circulated last November, on which it would welcome your opinion when your oral evidence is given. The following is a brief summary of the scheme as at present envisaged:-

A. Existing Bankrupts

1. The scheme will not apply to bankrupts -
 - (a) who have not surrendered
 - (b) who have been previously bankrupt
 - (c) on whose discharge the Court has already pronounced, or whose application for discharge is pending
 - (d) whose Public Examination has been adjourned sine die.
2. Subject to this the Official Receiver or trustee may at any time within 2 years from the coming into force of the new Act apply to the Court to enter a caveat.
3. If no caveat is entered the bankrupt will be automatically discharged at the end of the aforesaid 2 years.

B. Future Bankrupts

1. Application may be made for a caveat either at the conclusion of the Public Examination or (by the Official Receiver or trustee) within 2 years thereafter.
2. If no caveat is entered and no order is made by the Court on the bankrupt's application the bankrupt will be automatically discharged at the end of the aforesaid 2 years.

C. All Bankruptcies

1. The existing machinery for applying for his discharge remains available to every bankrupt to whom it is available today.
2. Where a caveat is entered (not, as in the original scheme, only where a discharge is refused) onerous duties as to reporting to the Official Receiver any change of name or address and any acquisitions are laid upon the bankrupt, and failure to fulfil them entails arrest and committal. From those duties the bankrupt can escape by - but only by - applying for and obtaining his discharge, or by payment in full.

You may be interested to know that the number of undischarged bankrupts has been estimated at about 40,000.

MINUTES OF EVIDENCE

TAKEN BEFORE THE

Bankruptcy Law Amendment Committee

FIRST DAY

Wednesday, 11th April, 1956

Present

HIS HONOUR JUDGE BLAGDEN (Chairman)

MR. C.E.M. EMERSON, F.C.A.

MR. H. LLOYD WILLIAMS

MR. H.E. PEIRCE, O.B.E., J.P.

MR. N.B. SHEPHERD, O.B.E.

MR. B.E.P. MACTAVISH

MR. C. ROY WATERER, I.S.O. } Joint Secretaries

LETTER RECEIVED FROM MR. CHARLES BRUCE PARK, O.B.E.,
INSPECTOR GENERAL IN BANKRUPTCY

Board of Trade,
London, W.C.1.

21st October, 1955

The Joint Secretaries,
Bankruptcy Law Amendment Committee.

Dear Sirs,

Bankruptcy Law Amendment Committee

1. I am sending to you for submission to the Chairman and Members of your Committee a number of suggestions for altering the law in relation to Bankruptcy and Deeds of Arrangement. These suggestions have come to light and prominence in the Bankruptcy Department in meeting the problems and difficulties which arise in day to day administration.

2. The principal alteration to Bankruptcy law requiring consideration is to secure a satisfactory and equitable method of dealing with the discharge of every bankrupt. This will require a radical amendment of the provisions of Section 26 of the Bankruptcy Act, 1914.

Whether a bankrupt obtains his discharge depends primarily upon whether he has made successful application therefor to the Court. Only one bankrupt in every four or five makes the necessary application, and it has been roughly estimated there are now more than 40,000 undischarged bankrupts in the Country. Faced with this large number Official Receivers would find it impossible - even if they had the power - to retain any form of control over these undischarged bankrupts whose activities may be, and as experience has shown frequently are, a danger to the trading community. The object of the suggested alteration is therefore to ensure that the past conduct of each bankrupt should receive consideration immediately after the close of the Public Examination and the question of his discharge then determined by the Court. There would thus be provided a means for distinguishing between the dangerous and the inoffensive insolvent debtor. The number of undischarged bankrupts would be greatly reduced; and the bankrupt whose discharge had been refused by the Court could be placed under an obligation to report, and to account, at stated intervals to the Official Receiver. At the same time, by the suggested alteration, many

administrative difficulties relating to after acquired property would be avoided.

3. Recommendations that every bankrupt's discharge should be considered by the Court were made by both the Committees appointed in 1908 and 1924 to review and to amend bankruptcy legislation. But their recommendations were not implemented on the grounds that the proposals put forward at the time to achieve that end would entail too great expense. It is, however, thought possible that there can now be evolved a satisfactory scheme, based upon the following points:-

(a) At the end of a certain period (two years is suggested) after the conclusion of the Public Examination of the bankrupt, every bankrupt would become automatically discharged unless a caveat were entered on the Court file against such automatic discharge.

(b) This caveat would be entered at the conclusion of the Public Examination on the application of the Official Receiver; or of any creditor who had proved his debt and was present; or on the initiative of the Court. The Registrar would take into account the evidence of the bankrupt, as given in his answers at his Public Examination, and upon hearing the applicant for the caveat thereon, would decide whether the bankrupt's conduct and financial dealings leading to his bankruptcy were such as to render it undesirable in the public interest that the automatic discharge should take effect. In that event, the Court would enter the caveat and at the same time fix a day, time and place for the hearing of the bankrupt's discharge.

(c) Any bankrupt whose discharge was refused by the Court would be required to keep the Official Receiver informed of all changes of his address, to account to the Official Receiver at the end of every six months as to all his financial transactions and any after acquired property or earnings and to attend upon the Official Receiver as and when required.

(d) If any bankrupt who had not a caveat entered against him were not satisfied to await the period when he became automatically discharged he would have the right to apply for an earlier discharge at any time after the conclusion of his Public Examination. In that event his application would be dealt with in the same manner as under the existing provisions of this Section.

(e) Provision for the automatic discharge of all existing undischarged bankrupts provided they had not been bankrupt on more than one occasion and the Court had not refused their discharge.

It is considered that the scheme outlined above would in practice save money.

4. Further suggestions for amending the provisions of the Bankruptcy Act, 1914, are mentioned below:-

Section 19. Appointment of Trustee

It is considered that the Official Receiver should act as Trustee in non-summary cases in which the creditors resolve that no Trustee be appointed and the Board of Trade sees no good reason for appointing some fit person to be the Trustee.

Section 38. Description of bankrupt's property divisible amongst creditors

An amendment of Sub-section 2(a) is desirable to restore the position before the Court's decision in re Pascoe (1944) Ch. 219 and so avoid the Trustee becoming the owner of onerous property by the automatic vesting of after acquired property in the bankruptcy Trustee immediately on its acquisition by the bankrupt. It is considered that no property should vest unless and until the Trustee intervenes and claims the property.

It appears inequitable that creditors in a first bankruptcy should participate in after acquired assets brought to credit in a second bankruptcy. Such assets almost always are created by the goods or moneys provided by post adjudication creditors who, under present provisions of the Act, may be swamped by creditors in the earlier bankruptcy and so discouraged from presenting a bankruptcy petition and making a debtor bankrupt for the second time.

Section 51

It is considered that this Section should be enlarged to take in all kinds of earnings including workmen's wages.

Section 69 (and also Section 29)

It is considered that only debts due to creditors who have proved their debts should be paid or should be reserved for, when a bankrupt's debts are paid in full with interest under Section 69, as under Section 29 (annulment of adjudication).

Section 129

Application of Act in cases of small estates.

The amount (£300) in value of the debtor's property which is fixed for the purpose of separating summary from non-summary cases might with advantage be raised.

Section 165

This Section should be amended to enable the Board of Trade to institute and carry on prosecutions in all cases.

5. I attach to this letter a schedule of further suggestions. They are described as "minor suggestions" in the sense that they are not regarded as controversial by the Bankruptcy Department, who deem them important in that adoption should clarify points of difficulty and doubt; meet changed conditions in trade and business; and, in general, facilitate administration.

6. Deeds of Arrangement

Under a Deed of Arrangement the law has conceived a form of liquidation of liabilities which should be a private matter between the debtor and his creditors. There is no official investigation into the debtor's conduct, whilst the Trustee is free from official control except for the purpose of effective registration; and for providing creditors with power to investigate the Trustee's account.

Amendments to the Deeds of Arrangement Act are now desirable to prevent serious abuses which have crept into Deed administration through the apathy of creditors, and because the Board of Trade have no sufficient authority to exercise control over Deed Trustees. These amendments should require all Deed Trustees to provide security to the Board of Trade in a like manner to that required of a Bankruptcy Trustee, and to give the Board of Trade powers of investigating the Trustee's administration in cases in which their accounts and accounting give cause for dissatisfaction; as well as in cases in which complaints are made by creditors.

7. It will be of interest to your Committee to know that a General Report of Bankruptcy and Deeds of Arrangement statistics, covering the years 1939 to 1953, is now being printed. Copies will be forwarded as soon as they are available.

If there are any matters upon which I can render assistance to the Committee I shall be glad to do so.

Yours faithfully,

(Sgd.) G. Bruce Park

Inspector General in Bankruptcy.

Schedule of minor suggestions for amending
the Bankruptcy Acts 1914 and 1926

Section 15(10) The following words additional to this sub-section are suggested: "If an Order dispensing with the Public Examination is made it shall have the same effect as an Order concluding the Public Examination."

These additional words would clear up doubt whether or not, when a dispensation Order has been made, any application can ever be made by a debtor for discharge.

Section 16(10) & (11) Substitute for these sub-sections one sub-section as follows:

"The Court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than 5/- in the £ on all the unsecured debts provable against the debtor's estate, but in all other cases may either approve or refuse to approve the proposal."

The absolute discretion of the Court is retained by the suggested new wording but such discretion is divorced from the conditions applicable to the present discharge procedure under Section 26.

Section 19(1) Omit the words "whether a creditor or not" and substitute therefor "not being a creditor".

The sub-section as at present worded is in conflict with the natural interpretation of sub-section 2. It does not seem possible for a creditor to act as Trustee (and, for example, admit or reject his own proof of debt) with impartiality.

Section 19(6) For the words at the end of this subsection "the Board of Trade shall appoint some fit person" substitute the words "the Board of Trade may appoint some fit person".

The mandatory "shall" has been the subject of observations by a Judge who suggested that some day an application might be made to the Court for an order of mandamus requiring the Board of Trade to appoint a Trustee. It is frequently an impossibility to obtain the consent of any fit person to be the Trustee, and in those cases where creditors pass a resolution that no Trustee be appointed, for the reason that they wish the Official Receiver to act as Trustee in spite of the case being non-summary, it is considered that there should be no provision in the Act which can be held as compelling the Board of Trade to appoint a non-official Trustee.

Section 19(8) Substitute for this sub-section, a new sub-section as follows:

"When a debtor is adjudged bankrupt after a first meeting of creditors has been held and a Trustee has not been appointed prior to the adjudication, then unless there was no quorum of creditors present at the first meeting or the creditors at that meeting resolved that no Trustee be appointed the Official Receiver shall summon a fresh meeting of creditors for the purpose of appointing a Trustee."

The present sub-section imposes on the Official Receiver the obligation to summon a fresh meeting when it is known that the creditors do not desire to appoint a Trustee. The present sub-section, therefore, results in useless expense and a waste of the creditors' time.

Section 29(4) It is suggested that this sub-section should be altered to do away with the necessity for making reservation for any debt due to a creditor who cannot be traced and who has never proved his debt.

The alteration would bring the operation of this sub-section, so far as payment in full of the debts, within the decision of *in re Emblyn Ward ex parte Hammond & Son v. The Official Receiver and Debtor* (1942) Ch. 294.

Section 31 Add a proviso to the Section - "For the purposes of this Section every Ministry of the Crown shall be deemed to be a separate legal entity."

Amendment of this Section is desirable to prevent set off of a debt or debts owing by the bankrupt to, say, the Inland Revenue against money owing to the bankrupt in respect of goods supplied to the Ministry of Supply. Up to the present set off has been allowed following an opinion given by the Law Officers some years ago that all Ministries or Departments of the Crown were one and indivisible for the purposes of this Section.

Section 33(1)(a) After the words "having become due and payable within twelve months next before that time" insert the words "in respect of a period commencing on or before the date of the Receiving Order".

This amendment is desirable to prevent a rating authority claiming preferential treatment for a rate made and published before the date of the Receiving Order but in respect of a period which does not commence until after that date. The present position is governed by the definition of "due and payable" by Lord Coddard in the case of *Thomson v. Beekenhams Borough Rating Authorities* (1947) K.B. 802 D.C; 1947 2 All E.R. 274.

Section 33(4) It is suggested that this sub-section which is difficult to apply should be entirely omitted from the Section.

Section 33(8) The period for which statutory interest must be paid should be limited to six years.

Section 38(2) Increase limit of £20 to, say, £50.

Section 44 The Section should be enlarged to include payments which amount to fraudulent preferences made between Petition and Receiving Order.

The law now appears to be that a payment made after Petition cannot be attacked even if in all other respects it satisfies the requirements of this Section which provides for the avoidance of preferences in certain cases.

Section 54(1) Sub-section 1 should, it is suggested, be amended to read as follows:

"Where any part of the property of the bankrupt consists of freehold land or land of any tenure either burdened with onerous covenants or binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, the Trustee, notwithstanding that he has endeavoured to sell or etc."

The amendment of this sub-section is desirable in order to remove any doubt as to the power of a Trustee to disclaim freehold property and also to make such disclaimer clearly available where the land desired to be disclaimed, although not burdened with onerous covenants, renders its possessor liable to perform an onerous act or to make payment in respect

thereof by reason, for instance, of an order to fence or possibly to demolish as a dangerous structure.

Section 55(1) & 56(3) reference also to Section 83(3). In Section 56(3) delete the words "or other agent" so that it will only be necessary for a Trustee to obtain authority for the employment of a Solicitor.

There is confusion between the provisions of the Sections referred to in that under Section 55(1) the Trustee without the permission of his Committee may sell all or any part of the property of the bankrupt by public auction or private contract. In the case of real property in order to carry out a sale by auction the services of both an auctioneer and a solicitor will be required, but in accordance with 56(3) the Trustee has always been considered to require the sanction of his Committee before employing a solicitor or auctioneer, the latter being within the term "other agent". Further, Section 83(3) prohibits the passing by the Taxing Master of the bills or charges of solicitors, auctioneers, etc. unless he is satisfied that their employment has been duly sanctioned, which sanction can only refer to Section 56(3).

It is accordingly considered that the provisions of the three Sections and sub-sections referred to should be amended to establish consistency.

Section 83(3) This sub-section requires consideration in conjunction with Section 55 and 56. The words used in the sub-section are so wide as on a strict construction to embrace every person employed by a Trustee for any purpose whatsoever. It has been suggested that Section 56(3) which requires the permission of the Committee of Inspection should relate only to the employment of a Solicitor. It is for consideration whether the provisions of Section 83(3) could not be confined, so far as the Taxing Master's duty to satisfy himself that the employment has been duly sanctioned, to the employment of solicitors only.

Section 154(2) This sub-section should, it is suggested, be amended to read as follows:

"Summary proceedings in respect of any such offence whether any special penalty is imposed by this Act or not shall not be instituted etc."

This amendment is required in order to defeat the present construction based upon the words "such offence" which confines the operation of the sub-section to those misdemeanours or felonies under the Act "in respect of which no special penalty is imposed by the Act". Owing to special penalties being provided for offences under sub-sections 13, 14 and 15 of Section 154, the time limit for proceedings has been held to be six months only as provided by the Summary Jurisdiction Act.

EXAMINATION OF WITNESS

Mr. Charles Bruce Park, C.B.E., Inspector General in Bankruptcy called and examined

1. Chairman: Mr. Bruce Park, I understand you are Inspector General in Bankruptcy and Registrar of Deeds of Arrangement and in charge of Companies' Liquidation Branch? - I am.
2. You used, if I remember rightly, to be Official Receiver attached to the High Court? - Yes, at one time.
3. In fact I suppose you have spent practically all your working life on the insolvency of persons other than yourself? - Not only persons but companies.
4. We have not been simply twiddling our thumbs since we were appointed. The committee has been carefully through the 1914 and 1926 Acts and the Deeds of Arrangement Act and have formed certain provisional views subject to what you and other witnesses may have to say to us. I did not propose to trouble you with questions on which the Committee sees eye to eye with yourself in your memorandum. The first thing you deal with, and the most important thing you deal with, in your memorandum is the discharge question? - Yes.
5. The Committee thought, subject to your and other people's views, that we could adopt the scheme you suggest with one important modification, namely that the duty to correspond with the Official Receiver might be imposed on any bankrupt against whom a caveat was entered, and not merely a bankrupt whose discharge was refused. Have you any views about that? - Yes, I have strong views. The intention of the scheme is to prevent the harm that is done by what has been called the "menace", that is the unscrupulous and dishonest undischarged bankrupt. I feel certain that unless the control to be exercised by the Official Receiver is confined to the "menace" and the really bad bankrupt, that is to say the bankrupt whose discharge is refused, the Official Receiver will not be able to ensure that accounting and reporting are carried out fully and in such a way as to provide a real control and check.
6. Do you not think there are very few bankrupts who are really such black sheep that their discharge is actually refused? - There are a very large number. At the present moment they are masked by reason of the fact that you have 40,000 undischarged bankrupts. Where so many people make a mistake is in making a calculation based on how many bankrupts yearly are refused their discharge. They multiply the present yearly number by four or five and say that would be the number if you insisted upon all bankrupts applying for their discharge. It is not so. It is the bad bankrupt who does not come forward and apply for his discharge.
7. If I follow you aright, you are saying there are 40,000 undischarged bankrupts who have never applied for their discharge? - That is so.
8. And a higher proportion of them would be refused than of the bankrupts who do apply? - Exactly. It is the bad bankrupt who does not wish to hear the Court pronounce on the character of his bankruptcy or upon his conduct who keeps away. Also a very large number of those responsible for really bad bankruptcies, who would have had their discharge refused if they had made early application, wait for such a period that when they do make their application the Court is inclined to deal leniently with them on the score, "Well, you have been undischarged for ten years....."
9. Assuming we decided to stick to the proposal that any "caveatus" - if I may use that term for want of a better - had to report and account to the Official Receiver, can you think of any means of checking or preventing an undue number of caveats being entered? - Yes, if the scheme I put forward is adopted, that is to say that whenever a caveat is entered a date is fixed for the hearing of the discharge and then the Court makes the pronouncement, I am confident that procedure will keep the caveats within reasonable number.

10. Do you think it would be possible to ask the Lord Chancellor's Department, or some other suitable department, when the Act comes into effect to send a circular round to Courts pointing out that there is no point in entering a caveat unless the case is at least so bad that the discharge would be suspended for two years? - That would be helpful. But if you ensure that the Registrar of the Court who hears the Public Examination also has to hear the discharge, he would make a point of seeing that the number of caveats granted were kept within bounds. Where you may have a large number of caveats entered would be if there is no hearing of the discharge afterwards. When any creditors then came before the Court to plead their case the tendency would be to say "enter a caveat".
11. We were inclined to agree with your view that the period of automatic discharge where there is no caveat should be two years, but like so many of these things it is one of those where time alone will prove whether that is the right period. Do you think it would be possible for the time to be fixed by Rule so that if two years proved wrong it could be modified without passing a new Act? - That would always be possible, of course, but I would rather fix on a clear time like two years and let people know where they were, so that when the scheme as a whole got going they would work to that time rather than under the impression, "Well, it is not working, we will get it altered". The idea that the period may be flexible is a bad thing in my opinion because there are quite a number of pieces to be worked into the pattern of the new scheme.
12. What about a sort of half-way scheme in which the Act would provide that the time could be fixed by Rules, and in default of any Rule it should be two years; or, alternatively, put it the other way round: two years or such other period as may be fixed by Rule? - That is a refinement. I am bound to say I still think it is better in a scheme of this kind to have right at the outset a definite time.
13. Have you any views about the effect the scheme would have on the chances of creditors getting better dividends - payments to creditors, that is to say? - Yes. If the scheme as put forward were adopted in its entirety - because it has to be a well balanced scheme - I believe you are going to curb the serious bankruptcy. You are going to stop the bad bankrupt saying, shortly before his bankruptcy "I have to go into bankruptcy, therefore let me make it a big one". I think we shall curb that kind of bankruptcy and it will make for bigger dividends in consequence.
14. You put a brake on the man who acts on the principle that he may as well be hung for a sheep as for a leg of mutton? - That principally, but in addition the scheme as a whole should prevent bad bankruptcies and keep the "menace" under control. The "menace" does not only work in bankruptcy. He is operating to quite a large extent under cover of small private "one man" companies. If you will curb the bad undischarged bankrupts by making the control and check upon them a really serious matter, then you will undoubtedly stop the "menace" using the small company for fraud.
15. The last remark you make about the scheme is that you think it would in practice save money. I do not mean provide money for creditors, but save public money. That of course is very important. Could you tell us your reasons? - It is little more than a pious hope. In the way I have worked out the scheme, the expense as compared with present procedures would about break even. Public examinations have for some considerable time been more than public examinations. They have been attempts by an Official Receiver to cover not only a public examination but his own report on the conduct of the debtor because he knows that a bad debtor, a bad bankrupt, may never apply for his discharge. Therefore he insists upon getting everything he possibly can on record at the public examination. And if by any chance the bad bankrupt does apply for his discharge, the discharge report is nothing more or less than a rehash of the public examination. I would suggest that, under the scheme, the public examination, both of those bankrupts who are granted automatic discharge and those against whom a caveat is entered with the knowledge that the

Official Receiver will put in a report afterwards on the hearing of the discharge, will be confined to the evidence that is wanted. Again, when the report of the Official Receiver comes forward, it will be confined to the matters which will assist the Court in making the pronouncement as to the character of the bankruptcy and the misconduct of the bankrupt. That seems in my opinion a considerable cutting down of the time taken, and it would mean that you would not require additional staff. As to whether you would make an appreciable saving I am, as I say, a little uncertain.

16. In other words you get more efficient administration for the same money? - You have put it exactly. Perhaps I should not have explained at length, but I wanted to get my point home.

17. Do you think it is worth retaining the reputed ownership clause in Section 38 or not? - No, it is archaic. There is so much bought in the home - let alone in business - on hire purchase that there is a different outlook these days. At one time hire purchase was thought to be a certain avenue towards bankruptcy. Today the outlook is entirely changed.

18. And as you can get on hire purchase pretty well everything except a coffin, which you want during your life there is really not much point in retaining it? - I believe that in America you can even pay for a funeral by instalments to the mortician.

19. I see you are in favour of an increase in the amount allowed for tools of the trade, bedding, and so on and so forth. You suggest £100? - My recollection is that I said £50.

20. Yes, that is right, £50. Do you think £50 is enough? - I think £50 is enough for this reason: that I would like to see the amount a little on the under side, so that it encourages what we do now, and that is temper the wind to the shorn lamb. This is not a replacement value, and I should therefore like to see that the working man was left in possession of all his used tools and not half of them taken away because it was over a large limit which suggested replacement value.

21. If you imagine the case, say, of a philoprogenitive dentist with a large family and a stock of equipment, £50 would go nowhere? - Nowhere at all, unless the figure of £50 is taken to indicate that there must be a valuation of worn instruments on the basis of what the bankrupt could get for them. The same principle applies if he happens to be a musician and has a piano. If he goes to sell it he would probably get £5; if he goes to replace it he would probably have to pay £150. The Official Receiver's representative who walks in to value it would say "Well, it would only realise about £5, or something like that; you have got to allow another £45-worth".

22. Could we now pass to Section 129. You suggest raising the amount of the debtor's property for the purpose of non-summary and summary cases. Have you any reason for that apart from the decreased value of money? - Yes. I have worked that out on the statistics available. In the £300 to £600 class of case which, I suggest, should be non-summary Official Receivers act as trustees more often than do accountants and it would therefore seem better to increase the present figure of £300 to £600.

23. Quite irrespective of the value of the present-day money? - I do not think it has a great deal to do with money values. The outside trustees do not want these smaller cases of the £300 to £600 class, whereas obviously the creditors do want the Official Receiver. There is another interesting fact bearing on this. The costs of the professional men who are employed in summary administrations are very much reduced, but it would be no hardship as far as I can see to raise the limit to £600, for this reason: that every Official Receiver has to have an auctioneer and a solicitor to whom he sends his business - who takes the rough with the smooth - and since there are now so many non-summary cases up to £10,000 to £20,000 class in which the Official Receiver acts these

professional men are receiving a good deal of the more profitable business. They could therefore, in my opinion, take a lesser fee for the work they do in this £300 to £600 class and so permit more dividend to the unsecured creditors, who in that way will be encouraged to take a greater interest in the bankruptcy.

24. Mr. Emerson: Surely those costs would be subject to taxation anyway? - Under the summary administration they have to take costs on the lower scale.

25. So would an outside auctioneer, would he not? - Yes, but the Official Receiver goes to one particular auctioneer, Miller Paxton. He has all the work because he takes the rough and the smooth. Now he is getting some quite big cases to deal with and so he can, it seems to me, quite well take costs on the lower scale in this particular class up to £600.

26. Even if there were an outside trustee in bankruptcy who employed an entirely different auctioneer, that auctioneer could charge no more. He is bound by taxation the same as Miller Paxton? - Yes, but he might well grumble by reason of the fact that he would be employed by the outside accountant in one particular case only.

27. He may grumble, but it will not result in any increased dividend for the creditors, because he is tied down? - Not in the slightest.

28. Chairman: In your main memorandum about Deeds of Arrangement I see you would like to see all Deed Trustees required to provide security. - Yes.

29. Would you like to explain to us why you think creditors should not be empowered to dispense with it if they want to? - In point of fact they do dispense with it; only one in a hundred of deed trustees gives security. The reason for it is this: that when it comes to a meeting of creditors, whoever is acting as chairman says "Now, Mr. X., the trustee elect, is a professional man, so I am quite sure that you will not expect him to give security". There is no creditor who in the face of that kind of statement will protest and say, "I think we should put this to a resolution".

30. They do dispense with it; they dispense with it in pursuance of a leading question from the chairman that they do not like to say no to? - Yes.

31. Mr. Emerson: The dispensation of giving security has to be in writing? - (Mr. Bruce Park:) Yes, that may be so, but also by resolution. - (Chairman:) Either by a resolution passed at a meeting convened by notice to all the creditors, or by writing addressed to the trustee. That is the existing machinery. - (Mr. Bruce Park:) May I say we have a similar difficulty in voluntary liquidations, and in a recent case got the impression that the Court considered there was not sufficient protection given to the creditors.

32. Chairman: We ought, therefore, to see that security is given in all cases in order to protect the creditors from themselves? - It is extraordinarily difficult for a creditor to insist on security if it is optional. A widow, some years ago, might ask a solicitor to look after her affairs - some trust property and so forth. She would never consider saying "I think you should take out an insurance policy to satisfy me as to your integrity". But I notice now that the Law Society have been careful to see that, in the event of defalcations falling on people who perhaps are not very good at protecting themselves those people do get protection.

33. You do not think this is one of these cases on which you have this paramount public policy to consider, namely that you are not likely to interfere with freedom of contract in this case? It is a contract. - It is, and a private contract. It is unfortunate that in Deeds of Arrangement and in voluntary liquidations the Government Department steps in and gives the appearance of a certain amount of control. When

anything goes wrong - and I could tell you of wrong doing under the present arrangements - when that happens creditors ask what has the Government been doing to permit this? Creditors do not have a great deal of time to spend on these matters and do not carefully enquire from the chairman as to whether the trustee might reasonably be required to give security.

34. The other point you make about the Deeds of Arrangement Act is that you would like to see the Board of Trade given powers to investigate. What we thought of doing about that was to empower the Board of Trade to conduct an audit on the application of any creditor, or the debtor, or, if the trustee has been removed, then by the Board of Trade itself off its own bat. That pretty well covers your point? - Not quite. As a last resource the Board of Trade should be able, of its own volition, if circumstances warrant it, to audit the accounts.

35. We are also proposing providing machinery whereby the trustee, in order to get his discharge from his trust under the Deed, has to lodge a final account. Would that help? - Yes. At the present moment a trustee has to file what is tantamount to a final account. But the Act itself is so badly worded that he can if he wishes say, "Although I am by the Act compelled every six months to submit an account, yet when it comes to the final account I am not compelled to submit that". The wording of the Act is "...until the winding up account", or "...until the final account", not "until and including". The consequence is we are hampered to that extent. We also come across cases where it is eminently desirable to audit the final account and there is not the opportunity to do it.

36. Mr. Emerson: I see the numbers of Deeds of Arrangement under the Deeds of Arrangement Act are of the order of 300 a year now. How many cases do you find each year of a really bad Deed of Arrangement trustee? Broadly speaking they are very very few and far between, are they not? - On the contrary. I would hesitate to give you case after case. Here is one we will call it "J.T.". The trustee is holding £244 in his hands now, although there has been no transaction since 1949. In his letter of the 17th March, 1954, he informs us that the assets have been realised, but pressure of work and staff shortage cause the delay in completing the administration under the deed.

37. I was not trying to get specific cases, but your idea of the percentage. Out of about 300 deeds a year, would it be 1 per cent., or 5 per cent.? - Much greater than that.

38. More than 5 per cent.? - Yes. It is difficult to say, but I should say a good 20 per cent.

39. As much as that? - Yes.

40. I am surprised. One in every five is a rogue? - No, I am not saying he is a rogue but he is dilatory and causes very considerable trouble. It is easy in my opinion to take the necessary steps to prevent these unsatisfactory cases.

41. Chairman: If we might now turn to your minor suggestions. We are in agreement with the very large majority of them. We were indeed in agreement with your proposal under Section 31 to provide that every Minister of the Crown should be a separate legal entity for the purposes of mutual credits and set off, but some members of the Committee had some doubt as to whether that would be workable in practice. You think it would? - I do not see how there could be difficulty. It is a question of whether they are entitled to set off or not, and that ends it, but as to whether you would ever get it through Parliament that is another matter. We have had one or two serious cases in companies liquidation, but they are few and far between in bankruptcy. There is the example of the debtor who would be due to receive a refund of tax which he had overpaid but before it is paid to him he becomes bankrupt, and a Government Department, say the Post Office, claim for telephone charges and say there is mutuality. But it is not mutuality, it is because Government Departments are regarded as one and indivisible.

42. The result, of course, is ridiculous? - The result is ridiculous.
43. As regards your proposal to limit the preferential period for rates and taxes to twelve months, we were rather wondering whether there is any justification for keeping preference for rates and taxes in existence at all. What do you say about that? - The preferential payments should be the same as those in companies liquidation, with the possible exception that the £200 for the wages of workmen should be reduced to £100, which was the figure suggested in the Cohen Report.
44. Could you explain your reasons? - Yes, certainly. The common error is that the Inland Revenue receive an undue share of the realisations. I have taken out figures for the years 1936, 1937, 1938, and for the year 1954. Those show that the gross realisations of the estates which were closed in the year 1936 amounted to £1,300,000. Rather peculiarly in the year 1954 they amounted to pretty well the same amount. In the year 1936 preferential creditors were paid nearly £97,000 - or 7 per cent. of the gross realisations, whilst the unsecured creditors received £64,000 which was 46 per cent. of the gross realisations. Rather strikingly in the years (1937 and 1938) that followed, the percentages were the same. Now we come to 1954, and we find the preferential creditors received £131,000 which was 9 per cent. of the gross realisations, and the unsecured creditors 44 per cent. of the gross realisations. A striking result when you come to consider that the standard rate for income tax in 1936 was 4s. 9d. and in 1954 it was 9s. 6d. These figures are, of course, aggregates. So far as the small, individual estate is concerned, the Inland Revenue frequently comes in and takes the lot. That seems to be unfair and I would suggest that in bankruptcy preferential creditors should first receive 25 per cent. of the amount available for distribution, the balance of their claim ranking *pari passu* with the unsecured creditors. If that were done some appreciable return would always be secured for the unsecured creditors which will encourage them to take an interest in the bankruptcy.
45. I think we all felt it is rather unfair that the tax and rating authorities should have all the remedies they have at their disposal and - if they allow a man to get badly into their debt - that they should then take the cream off the milk as against the creditors who have not their special remedies. - Yes. Taxpayers complain that the Inland Revenue are either dilatory or too hasty - harsh as regards themselves or lenient as regards the other fellow. But the facts do not show the Inland Revenue to be dilatory in the general run of trading cases. When a trader's business is starting to go downhill he immediately stops making his income tax returns, waits until he gets an estimated assessment, and then appeals. If he stops paying his suppliers, he immediately gets his credit stopped. In effect, he trades upon the amount that is due in taxation. Until bankruptcy intervenes the unsecured creditors often receive, the form of trading profits, enough to recoup themselves for the cost of goods supplied to the debtor, so that in the end it is only the unfortunate Inland Revenue who has been left without any payment at all. Tax is a debt to the community and I would like to see the Inland Revenue kept, as far as possible, as a preferential creditor. But in small estates it would, in my opinion, be equitable to give them a percentage.
46. And you would limit the preferential creditors to twenty-five per cent? - Of the amount available for distribution. In quite a large number of cases the 25 per cent. would pay them in the ordinary way, but that would mean, of course, that the unsecured creditors would get their 75 per cent. It would cut down abuses if that were done, including the case in which the trustee gets excessive remuneration because the Committee of Inspection vote him all the realisation in remuneration rather than see it paid preferentially to the Inland Revenue.
47. You say under Section 33 (8) that, in your view, the period of statutory interest should be limited to six years. Why do you suggest that? - In nearly every case where there have been many years of interest to be paid, there have been applications to the Official Receiver and the Court to abate that interest so that something might come from the

windfall, or whatever it is, to the destitute debtor or to his family, and when the interest is payable for a period in excess of the six years contained in the Statute of Limitations, sympathy is aroused. I think myself if you could limit the interest to a period, a clear-cut period such as the six years in the Statute of Limitations, it would be better than leaving the administration to be the target for this "give a little comfort to the destitute" attitude.

48. There is a very big difference between the facts where statutory limitation applies and the facts we are dealing with. The creditor is not sitting back and twiddling his thumbs in the period he is kept waiting for his money between the Receiving Order and dividend, like the creditor barred by the Statute of Limitations. It is happening quite involuntarily? - A request for reduction of interest is often met by the Department saying: "We cannot help you unless you get from the creditors their assent that they will only take so much interest in the circumstances". Whether it is that we are becoming soft I do not know, but it is the fact that the result is that, nearly every time, interest is reduced or given up. I think it would be better, therefore, to have a limit imposed and know where we are.

49. The suggestion has been made that for the last few weeks, say three weeks before the crash comes, a payment which results in a preference should be recoverable without proof of intent. What would you say about that? - (Mr. Bruce Park): That it is extraordinarily difficult. - (Chairman): You have to except the price of current necessities. - (Mr. Bruce Park): You mean food? Obviously that would be so, but it would be extraordinarily difficult to put into practice. If there is no dominant intention to prefer, a trader who is not necessarily striving to stave off bankruptcy but to pay his creditors during a time that he is looking for some asset to come in, and having to keep them sweet, very naturally pays them in different proportions. Every payment, in such circumstances, would be a preference. The only way in which a trader could avoid preferring creditors would be, at the end of every week's trading to add up the whole of the amount owing to unsecured creditors, take whatever money is available and divide it proportionately amongst the whole body of creditors. Immediately that were done he would know he could expect a petition because creditors would think he was trying to conduct a private Deed of Arrangement. When there is no dominant intention to prefer to be taken into consideration there is the difficulty of ascertaining which payments are preferences and of making recovery.

50. Talking of that difficult Section, would you be in favour of restoring the views of Mr. Justice Eve as against those of Mr. Justice Clauson on guarantors and sureties? - (Mr. Bruce Park): I am a little vague for the moment. It is a question of getting the guarantor into the shoes. - (Chairman): Enabling the trustee to shoot directly at the guarantor instead of having to shoot at the principal creditor first, leaving the principal creditor to recover against the guarantor - (Mr. Bruce Park): I do not think that he should shoot at the guarantor first; I think he should look to the principal creditor.

51. As he does at the moment? - As he does at the moment, but the position may be complicated. I should like to think that you could simplify the position, but I do not think that I can really help you a great deal on that.

52. Do you not think it is rather unfair that if, between, say, the Receiving Order and the time when the trustee launches a motion to set it aside, the guarantor has either fled the country or become insolvent, that the risk of that should fall on the principal creditor as it does at the moment? - Yes, there are such cases and they have given rise to contradictory decisions in the Courts.

53. You do not feel very strongly then, either way, on that point? - No. On those particular Sections I would need to consider very carefully, apart from obvious points, the questions affecting the surety and the principal.

54. I see under the disclaimer Section you want to make it perfectly clear that freehold land could be included? - Yes.
55. We are in agreement with you about that; we differ slightly as to the mode of doing it. What we thought of suggesting was that the word in the Section should be merely "land", and that we should in the definition Section say that "land" has the same meaning as in the Law of Property Act. - An excellent way to do it.
56. The definition in the Law of Property Act is about as comprehensive as it possibly could be? - Yes, certainly.
57. There are one or two miscellaneous points that occurred to me which you have not mentioned in your memorandum. The view has been expressed to us from a very high quarter that the time at present limited for compliance with the bankruptcy notice is too short, and the time for lodging an affidavit of set off or counter claim is far too short. I do not know if you have any views about that? - No but I see no reason at all why these periods should not be extended.
58. After all the object of the exercise is not really to create an act of bankruptcy; it is to get the money? - Quite.
59. And I should have thought myself if you made it three weeks for compliance with the bankruptcy notice, and a fortnight for the affidavit that would be ample. - I would have thought so too, but I have not given consideration to the question of the time.
60. Talking of time, it has been suggested that the time for a petition founded by a Deed of Arrangement might with advantage be cut down to a month. - That is the same period as that to which it is automatically cut when you give notice of a Deed of Arrangement.
61. But the effect in my own experience is inevitably to invite a bankruptcy petition. We thought it might be better to cut it straight away by the Act. I do not know what you feel about that? - I would have thought it would be better left as it is, as there never seems to be enough time in any of these things, but I have no very strong views either way.
62. Have you any views about whether we should preserve or enlarge the £50 minimum for the petitioning creditors debt? - Yes. Keep the minimum as it is. There is no limit or minimum as far as the debtor's own petition. This was reviewed prior to the enactment of the 1948 Companies' Act. Under that Act the test whether there ought to be a winding up order made, is the test of insolvency. One of the circumstances in that test is if the Company has not been able to pay a debt of £50, which is quite a large sum if it is owing to an individual. It would be best to keep the minimum as it is rather than throw the onus upon creditors to join together in order to get a Receiving Order, particularly in small debt cases - confidence tricksters, mail order businesses and the like.
63. Would you be in favour of altering the existing law in such a way that a creditor cannot be the trustee? - Yes, certainly. I do not like the idea of creditors having to deal with their own debts. I dare say you could find plenty of creditor trustees who would act perfectly straightforwardly, but you would always find creditors critical of their actions and that does not make for smooth running of a trusteeship.
64. One of the memoranda we have had suggests that we should go even further and provide that the trustee must be a person who would be qualified to act as an auditor of a company other than an exempt private company. That would mean limiting the trusteeship to persons having a professional accountancy qualification. - It would meet with a great deal of opposition. It is a suggestion which I would not adopt.
65. You would not? - No. I consider the creditors should be able to vote for and obtain as trustee the person, whether accountant or solicitor or non-professional man, they think most fitted for the task.

66. I do not quite see how this suggestion, if we adopt it, would make things worse. - I do not think it would make things worse, but it is unreasonably narrowing the field, is it not? I think it would provoke too much opposition.
67. We have asked you about one or two figures that are in the Act. There is a pretty old Section which empowers an order for arrest to be made if the debtor removes goods to the value of £5. Would you be in favour of that figure remaining unchanged? - £5 strikes me as very low.
68. It is £5 at the moment. Now, it seems to me that the decline in the value of money must be taken into account. What would you suggest - £10? - I should put it up very much more than that.
69. Why not bring it into line with the divisible property Section at £50? - Yes, I would accept that. I have not given great consideration to it.
70. We have given a lot of consideration to the question of distress and execution, and we thought of recommending a simplification of those Sections by adopting the principle of "21 days hit or miss" - that if the distraining creditor can manage to hold on for 21 days without receiving notice of a bankruptcy petition he is home. If he gets notice of a bankruptcy petition he has got to cough up. - I should say it is an excellent suggestion.
71. These Sections are so complicated at the moment that I do think you want some simplification. - I quite agree. That would be an excellent suggestion.
72. You will probably remember that there is a Section at the moment which requires the first dividend to be paid within four months. Would you be in favour of extending that, say to six months? - Yes.
73. Another rather small point about dividends on which we would like to have your views is this - the time for payment of final dividend at the moment is fixed at the joint discretion of the trustee, and the Committee of Inspection, if there is one. Do you not think that should be left to the sole discretion of the trustee, because I do not see what is to happen if they do not see eye to eye about it? - Yes, I think it should be at the discretion of the trustee.
74. Under Section 89(5) the trustee is not allowed to retain more than £50 for more than ten days in his hands. In those days £50 seems rather a little. We thought it might possibly be increased to £100. - I see no objection to that.
75. We were thinking of proposing one rather novel amendment to the Schedules which we have debated strenuously, but not, I hope, acrimoniously. That was a suggestion that it should be made possible for a creditor to appoint as his general proxy somebody who is not in his permanent employ, but a professional man, such as a solicitor or an accountant, provided that only a person in the regular employment of the creditor would be eligible to serve on the Committee of Inspection. Do you see great objection to that? - No, I should like to see the general proxy in bankruptcy altered to what is generally known as a general proxy - the same form as is used in companies liquidation. Thus, if a creditor in Newcastle wants to have somebody to represent him, and has no one in his employ able to do so, he can then appoint a person as his general proxy to attend a particular meeting and use his discretion as to voting in accordance with the agenda of that meeting.
76. Could we not go further and enable him to give a man - say his solicitor or accountant - the power to attend meetings generally and use his discretion? Need it be limited to one particular meeting? - I would limit it to one particular meeting because whenever a meeting is called, proxy forms are sent out. It may be that once a creditor has

appointed one particular person to attend all meetings - there are not as a rule very many in bankruptcy proceedings - that person may go abroad, or otherwise become unavailable.

77. The form of power of attorney used in companies liquidation is really not a general power in the ordinary sense of the word at all, is it? - With respect, I have an Opinion obtained as far back as 1907 on that very point. If you want to appoint persons to be members of the Committee of Inspection by document, that document can be a general power of attorney in a prescribed form. It is the method that is used in every liquidation where the appointment is made by the Court. The name of the person appears in the Order of Court: - "General power of attorney for....." - and there can be no mistake, or abuse.

78. One other small point I want to ask you about - harking back to property. Supposing that a man goes bust and he has tools of his trade, clothes, bedding, and so on, which are worth more than the limit. There is at the moment no machinery for deciding which articles he has to keep and which he has to give up? - Quite.

79. Do you think it is possible, or indeed desirable to devise any such machinery? - No. I would like to refer you to my words - "tempering the wind to the shorn lamb". A bankrupt should be allowed to keep the tools of his trade, provided they have been used and worn, and the apparel, and the bedding and so on, whatever value it is. After property of that kind has been used it is a very clever man who will be able to say: "This or that is outside the limit, and so we are going to take it away".

80. You would leave it as it is and apply the principle of "tempering the wind"? - Yes.

81. As regards Deeds of Arrangement, do you see any need to register a Deed in which there is no assignment to a trustee and no provision for such an assignment? - You mean a Deed of Inspectorship? There have been such things, but they are few and far between. I should say that they should be registered.

82. But if no property passes I should have thought your Department did not want to be bothered with it? - We do not want to be bothered with such a Deed but I do not think such a Deed will arise unless you can have a Deed of Inspectorship plus property.

83. They are very rare birds, but I have seen them, I am sure, with a covenant to assign to the Inspector in certain events. If there is a covenant to assign, even at a future time, you would want the Deed registered? - I think so.

84. But if there is no such provision at all, then you need not be bothered? - No.

85. We have been considering also the possible functions of an Official Receiver where there is a complete deadlock of administration under a Deed. Have you any views about that? - (Mr. Bruce Park): Do you mean appointing the Official Receiver to take over? - (Chairman): Not as trustee but for the purpose of convening a meeting of creditors - taking the steps that may be necessary to get a new trustee into the saddle. - (Mr. Bruce Park): Well, this might be the way of bridging the gap. If there is likely to be a hiatus, a gap, I should certainly like an Official Receiver to keep an eye upon the estate.

86. He should be a sort of caretaker more than anything else? - Yes.

87. Mr. Emerson: I understood you to say that, under Section 33, you are in favour of leaving the preferentials as they are at the moment. - Yes.

88. Does that not conflict with the suggestion in your memorandum where you say:-

"After the words "having become due and payable within twelve months next before that time" insert the words "in respect of a period commencing on or before the date of the Receiving Order".

Is not the effect of that to limit the Crown's proof of debt to the year preceeding the Receiving Order? - If that is the effect, then I am not in favour of it. It would mean that the Inland Revenue would never have a preferential claim.

89. Would you be in favour of restricting the taxation Section to solicitors? - Yes, and I would also like to see Section 83(3) amended so as to confine it, so far as the Taxing Master's duty to satisfy himself that the employment has been duly sanctioned, to the employment of solicitors only. That is not a matter of taxation, but whether the employment has been duly sanctioned. We have had a great deal of trouble on this question of the employment of solicitors. The work has been done and the solicitor cannot get his money because there has been delay in obtaining the sanction. We want to confine that sanction - certainly not to extend it - and it is suggested that it should be confined to the employment of solicitors only. I should be in favour of amending the Section to provide that should the sanction be obtained, say within three months after the commencement of the employment, the Taxing Master should accept the bill for taxation.

90. Would you be in favour of an amendment whereby public utilities, and the gas and electric light suppliers in particular, should be debarred by law from claiming payment of arrears before they will continue future supply to a trustee? - I have an idea, you know, that they can compel payment under the present ruling. Where there is an enforceable claim, established by custom as well as possibly by law, I do not think you could alter it.

91. It is really a matter for the particular Act concerned - that is the Act under which gas or electricity is supplied - rather than the Bankruptcy Act? - I should have taken that view.

92. The last question I have got relates to the question of the second bankruptcy. We have had a suggestion from a witness which reads as follows:-

"In my opinion, assets acquired by an undischarged bankrupt should be available for distribution to the Creditors of a second or subsequent bankruptcy, in priority to any debts remaining owing in the prior bankruptcy, provided that firstly, the liabilities in the second bankruptcy were incurred wholly or partly in the acquisition of such assets, and provided also that creditors who had knowledge of the fact that the debtor remained undischarged from a previous bankruptcy, should be excluded from such prior distribution, but should rank *pari passu* with the Creditors of the first bankruptcy in the event of there being a surplus after the claims of the other Creditors had been discharged in full. It should also be made clear that this priority applies only to assets acquired before the date of the second bankruptcy as there seems no good reason why it should extend to assets acquired after that time. If, for instance, the bankrupt benefits under a Will after his second bankruptcy, the Creditors of both the first and the second bankruptcies should share such benefit rateably."

We were inclined to the view that this was a good suggestion, but doubted whether it was workable. I wonder what your re-action to it would be. - I have always thought that the creditors of the second bankruptcy should have the first right to rank against assets created by the bankrupt's trading, his savings, and so on, after the first bankruptcy; but whether you could make an exception for legacies and specific amounts like that, I do not know.

93. You think it is workable? - It would be a workable proposition so far as legacies and similar payments are concerned.

94. Legacies and the like? - Yes.

95. Mr. Sherwell: May I put a question - going right back to the beginning? On the question of caveat, you suggested that this should be applied for and entered at the end of the Public Examination? - Yes.

96. Do you think that might be extended to allow a caveat to be applied for at any time during the period of two years? - I see no objection to that. It simply gives the right to somebody who has seen bad conduct on the part of the bankrupt who is to get his automatic discharge to apply for a caveat. That, I think, is an excellent suggestion.

97. As regards existing undischarged bankrupts at the date when the Act comes into force, we thought that they should be given an automatic discharge at the end of one year, subject to the right of an Official Receiver to ask for a caveat at any time during that year. -

(Mr. Bruce Park): It is going to be difficult for Official Receivers to go right through the lists in that time. I would rather make the period two years in which to apply to enter a caveat against any of these existing undischarged bankrupts, and to extract from the registers for a period of at least ten years the name of every bankrupt who has been bankrupt twice. - (Chairman): We were going to except bankrupts who had been bankrupt twice. - (Mr. Bruce Park): And those who had been refused? (Chairman): Yes. - (Mr. Bruce Park): In that case I am with you again.

98. We thought that a certain number of black sheep would escape from the fold, but anyone whose Public Examination had been recently concluded would be fresh in the Official Receiver's mind. - There would have to be a good linking up with those undischarged bankrupts who are operating behind the scenes in the management of one-man companies; and if you give the Official Receiver a two-year period he will have twice as long to look round and apply for the entry of a caveat.

99. Chairman: There has been a suggestion that bankrupts who have never surrendered, or those whose examination has been adjourned sine die, should also be excluded from automatic discharge. - I would agree to that over a period of ten years.

100. A backwards period? - A back period of ten years.

101. Mr. Sherwell: If I may turn to the First and Second Schedules of this Act, which deal with meetings of creditors and proof of debt. I have always taken the view that these contain matters of machinery, such as time limits and documents and quorums. I have always thought they were much more appropriate to Rules than an Act of Parliament, because you cannot easily alter an Act of Parliament. I do not think these matters of detail are appropriate to an Act of Parliament at all. I would have thought that if there are any amendments required to these Schedules we ought to put the whole lot in Rules, so that they can be altered easily, and not have them as part of the Act of Parliament, where it is so much more difficult to amend them. - There is a point there. Keep the same practice as we have now, and we shall be able to amend the Rules quickly and easily. The Lord Chancellor makes the Rules. The President concurs, and the new Rule is made law by Statutory Instrument.

102. Then would you rather see what are at present the Schedules turned into Rules under the Act, or would you rather keep them as appendices to the Act? - I would prefer to keep them, if it is possible, as they are now, with the added possibility of being able to make alterations as I have suggested. If that is not possible, then I would prefer to see them turned into Rules.

103. Mr. Lloyd Williams: You could, in fact, put in at the end of the Act a provision saying that those details can be altered by Rule? - That is what I meant. You have the same kind of thing with the Schedules at the end of the Companies Act.

104. Mr. Sherwell: It is rather ridiculous in a way that you should have to have an Act of Parliament to alter these things? - I am absolutely with you if you cannot alter the Schedules. But if you can do that - and I do not see why you should not - it seems to me it is best to keep the form that is known.

105. Chairman: I myself do not see any insuperable difficulty in providing in the Act that the rules in the Schedules may be altered by Rules made under this Act. - Quite.

106. We are very much indebted to you, Mr. Bruce Park, for coming and giving us your help, and I am sure the Committee would all like to wish you a long and happy period of retirement. Perhaps you might be agreeable to coming back again at a later date when we have heard the other evidence. - Yes, I would be pleased to do that.

(The witness withdrew)

Monday, 16th April, 1956

Present

HIS HONOUR JUDGE ELADEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EDMERSON, P.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

MEMORANDUM SUBMITTED BY SIR THEOBALD MATHEW, K.B.E., M.C.,DIRECTOR OF PUBLIC PROSECUTIONSPROSECUTIONS UNDER THE BANKRUPTCY ACTSA. The Institution of Proceedings

1. Bankruptcy offences are dealt with in Part VII (secs. 154 to 166) of the Bankruptcy Act 1914, as amended by the Act of 1926.

2. Offences under sec.157 (gambling) and under sec.158 (failing to keep proper accounts) can only be prosecuted by order of the court (secs.157(2) and 158(2)).

Otherwise there is no statutory limitation on who may prosecute for the other offences created by the Acts.

3. By sec.161 where the official receiver or a trustee in bankruptcy reports to the court that in his opinion a debtor has been guilty of any offence under the Act, or where the court is satisfied on the representation of a creditor, or member of the committee of inspection, that there is ground to believe that the debtor has been guilty of any such offence, "the court shall, if it appears to the court that there is a reasonable probability that the debtor will be convicted, and that the circumstances are such as to render a prosecution desirable, order that the debtor be prosecuted."

4. Section 165 is in the following terms:

"Where the court orders the prosecution of any person for any offence under this Act or any enactment repealed by this Act, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution:

Provided that, where the order of the court is made on the application of the official receiver and based on his report, the Board of Trade may themselves, or through the official receiver, institute the prosecution and carry on the proceedings, if or so long as those proceedings are conducted before a court of summary jurisdiction, unless in the course thereof circumstances arise which, in the opinion of such court or of the Board, render it desirable that the remainder of the proceedings should be carried on by the Director of Public Prosecutions."

5. The present position is anomalous and unsatisfactory.

In practice it is now quite exceptional for prosecutions for offences against the Acts to be initiated by anybody other than the Board of Trade or the D.P.P. Occasionally charges of such offences are added to other criminal charges, where there is evidence that the accused is an

undischarged bankrupt, and there have been a few cases in which the police have charged an offence under sec.155 (obtaining credit).

It is, in my opinion, most desirable that the Board of Trade should be generally in charge of the policy with regard to prosecutions, and that they should know of all prosecutions under the Acts.

6. The division of responsibility for the conduct of prosecutions between the Board of Trade and the D.P.P. is anomalous.

In cases in which the prosecution is undertaken without a court order the Board of Trade can conduct the proceedings throughout. But in cases in which there is a court order the D.P.P. is under a duty to prosecute, with the proviso that in certain cases the Board of Trade may institute and carry on proceedings, if and so long as the proceedings are conducted before a court of summary jurisdiction.

This again creates difficulties as it is obviously inconvenient to change the prosecutor in the course of a case.

These difficulties are largely obviated by arrangements between the Board of Trade and the D.P.P. whereby the D.P.P. initiates proceedings in such cases in which it is clear from the outset that the accused must be tried on indictment.

But there still remain a number of cases, for example if an accused unexpectedly elects to go for trial, in which practical difficulties arise.

7. The figures of prosecutions under the Bankruptcy Acts for the years 1952, 1953 and 1954 were as follows:

<u>D.P.P. and Board of Trade</u>		
	<u>On Indictment</u>	<u>Summary</u>
1952	26	39
1953	35	55
1954	28	53

8. There is a further point. Cases arise from time to time in which the court orders a prosecution but when the matter is investigated, with a view to criminal proceedings, it is found that the necessary evidence is not available to establish the offence in a criminal court. This creates the unfortunate position that it appears that the D.P.P. has failed to obey an order of the court.

9. It is interesting to note that under the 1914 Act (sec.163) the bankruptcy court had full powers to commit for trial, but this section, which was never used in practice, was repealed by the 1926 Act (sec.9). It would appear however that some of the special provisions of sec.165 may have been enacted with these powers in mind.

10. In my opinion there is no longer any valid reason for these special arrangements with regard to prosecutions, and I suggest that a provision that all offences under the Acts should be prosecuted by the Board of Trade, or by or with the consent of the D.P.P., is all that is required.

Such a provision would be in accordance with modern precedent; it would avoid the existing difficulties, and would ensure the Board of Trade were generally in control of the policy with regard to criminal proceedings, and that they would have knowledge of all contemplated prosecutions under the Act: and it would still leave it open to the court to bring to the notice of the prosecuting authorities cases that it considers merit prosecution, without having to direct its mind to the technicalities arising in criminal proceedings.

B. Limitation on Summary Proceedings

11. Sec.164(1) prescribes the punishments for a person guilty of an offence under the Act "in respect of which no special penalty is imposed by this Act". By sec.164(2) summary proceedings "in respect of any such offence" (i.e. one in which no special penalty is imposed) shall not be instituted after one year from the first discovery thereof.

Under the 1914 Act there was only one offence for which a special penalty was imposed, namely, a false claim by a creditor (sec.160).

However, under the 1926 Act special penalties were prescribed for offences under sec.154(1) - (13), (14) & (15). The result is that the ordinary six months' limit now applies to these offences, instead of the extended time limit under sec.164(2).

The Board of Trade receive a number of reports of offences under these sections, which are out of time for summary proceedings, and do not merit trial on indictment.

It would be almost impossible under the existing procedure for the Official Receiver to be in a position to report and obtain a court order within six months of the commission of these offences.

There seems to be no logical reason for the distinction in time between these and other offences under the Act. Indeed it would appear that the present position is due to an oversight that might now be rectified.

Consideration might be given at the same time to bringing sec.164(2) into line with section 442(1) of the Companies Act 1948.

This section gives the time limit for summary offences as being 12 months from the date upon which evidence sufficient in the opinion of the D.F.P. or the Board of Trade comes to his or their knowledge, with a limit of three years from the commission of the offence.

C. Miscellaneous

12. I do not know whether the Committee propose to consider in detail the drafting of the various penal provisions but I thought it might be useful to place on record the following suggestions:

(1) Sec.154(16). Although the intention of this section is clear the drafting could be improved.

(2) Sec.156. Again it would be helpful if the drafting were made clearer.

At present there are doubts as to whether the offences are pre- or post-bankruptcy. On the face of it it seems clear that the offences are intended to be post-bankruptcy, but in practice they are nearly always committed before the debtor has been adjudged bankrupt or has had a receiving order made against him. In consequence difficulties often arise concerning the wording of the summons. Sub-sections (b) and (c) suggest pre-bankruptcy offences since the debtor has no property after adjudication. I suggest that it ought to be made quite clear in any amending Act exactly what is intended by this Section.

(3) Sec.160. There appears to be no good reason why the offences under this section should be triable only on indictment, and it would be useful to make them summary as well.

(4) Sec.164(3). This section, which reproduces sec.18 of the Debtors Act 1869, as a result of an ill considered amendment enacted by the Administration of Justice (Miscellaneous Provisions) Act 1933 (sec.10(3) and Sched.3) now appears in this chaotic form

"(3) Every misdemeanour under this Act, and when any person is charged with any such misdemeanour before a court of summary jurisdiction the court shall take into consideration any evidence adduced before them tending to show that the act charged was not committed with a guilty intent."

Presumably this clause was not intended to mean, that a court of summary jurisdiction is to consider, but that any other court should ignore evidence that, quite apart from this clause, it is the duty of any criminal court to take into account, at least as regards sentence.

It appears to be a form of statutory homily to justices and, as such, I suggest has no place in a modern statute.

D. Venue

13. When it is considered appropriate to institute summary proceedings against a bankrupt it frequently becomes difficult to bring all the offences within the jurisdiction of one summary court without resorting to a fictitious application to the court under Section 18(3) of the Magistrates' Courts Act, 1952. Where, for example, an undischarged bankrupt has obtained credit for upwards of £10 in more than one petty sessional jurisdiction, in order to get all the offences into one court the prosecution has to adopt the pretence of applying for the offences to be dealt with as if they were indictable offences, and subsequently after evidence has been given to make representations to the court under section 18(3) of the Magistrates' Courts Act, 1952. In such a case the court may if it thinks fit proceed to deal with the offences summarily.

A similar difficulty also occurs in cases of offences contrary to sections 154, 156 or 157 of the Act. In such cases where offences have been committed in more than one jurisdiction the prosecution usually seeks to bring all the offences before the court having jurisdiction in the place where the bankruptcy proceedings are taken. The argument used is that none of the matters mentioned in section 154, 156 or 157 become offences under the Act until the accused has been adjudged bankrupt or had a receiving order made against him. Consequently although the Acts may have been done in one jurisdiction they are not completed offences until the accused has been adjudged bankrupt and by virtue of section 3(2) of the Magistrates' Courts Act, 1952 the court has jurisdiction. This argument is not accepted by all summary courts and it is not difficult to conceive of circumstances when the argument would not be attractive to the court.

It is often in the interests of the public that a bankrupt should be prosecuted in the court having jurisdiction where the accused lives or carries on business, since the attendant publicity is more likely to be more effective there than at any other place.

I suggest, therefore, that it might be provided that proceedings against any person for a bankruptcy offence may be taken before the appropriate court having jurisdiction in the place where the person is for the time being or where he was adjudged bankrupt.

(Sgd.) THEOBALD MATHIAS

12th December, 1955.

EXAMINATION OF WITNESSES

Mr. Gerald Richard Paling, C.B.E.	} Deputy Director of Public Prosecutions
Mr. Edward Moreland Parsey, C.B.E.	
Mr. Terence Horkin	} Prosecutions Branch, Solicitor's Department, Board of Trade

Called and examined

107. Chairman: My first question concerns Section 154. As you will see from the draft Act in front of you, we have tried to simplify the first of the criminal sections, which is Section 154. We felt there was a terrible lot of overlapping between various offences created by that Section and indeed with one or two offences under the Larceny Act. Among the changes we thought of recommending was the deletion of paragraph 11, that is:- "Fraudulently altering or making omissions in documents". There is another paragraph which also deals with alterations to documents, paragraph 10, and these two seem to us to overlap very considerably. - (Mr. Paling): They are different offences. No. 10 is "Making of a false entry in a book affecting his property or affairs unless he proves he had no intent to conceal the state of his affairs or defeat the law." The onus of proof lies upon him, but in No. 11 it is "Fraudulently parts with, alters or makes an omission in any document." In one case, paragraph 11, the onus is on the prosecution to show fraud, and in the other the onus is upon the debtor to show that he had no intent to conceal the state of his affairs.
108. I agree they are not identical, but is there any point in keeping both? - (Mr. Parsey): I wondered if there was a distinction between making a false entry in a book or document and altering a book or document.
109. If it is a fraudulent alteration, which it has got to be under 11, it would have to be a false alteration, would it not? - (Mr. Horkin): They could tear a page out of a book, which would not be covered by 10, but would be by 11.
110. Yes, that is possibly true, but mutilating books is dealt with under 9. If you have 9 and 10 the matter is so buttoned up you did not need 11? - Is not the answer that one paragraph would probably cover the lot but that it is a matter of drafting. Before this meeting, we went through these offences very carefully to see whether or not each was covered elsewhere. We could find an example of an offence under each paragraph which was not covered elsewhere. It is quite true if you did have one paragraph you could probably bring them all in but it would mean altering rather than leaving out a paragraph. - (Mr. Parsey): Subject to this proviso, the one Mr. Paling made so appositely; it is quite a different situation when the onus is on the prosecution to prove fraud from the position, as, for example, when somebody has made a false entry in a book, where the prosecution merely has to prove that the act has been committed and it is then for the defendant to get out of it if he can by showing that he had no intent to defeat the law.
111. Mr. Lloyd Williams: Is there anything in 11 which is not covered in 9 and 10? You said you had an example of each particular case. Where is your case in 11 that is not covered by 9 and 10? - (Mr. Horkin): I am sorry, perhaps we were too definite on that, but when discussing this before we did try and get an example under each paragraph. I cannot think of one on 11 now.
112. Chairman: I think, apart from the onus of proof, it is covered. I suppose you would agree that, in so far as you can simplify the Section by omission, it is desirable to do so? - (Mr. Paling): Yes, I quite agree. One thing occurs to me in 11 - "Fraudulently parts with - i.e. he fraudulently parts with." I do not see that parting with a book or document is covered in 9 or 10.

113. You have it in 9 "Concealment". If he parts with it by burying it in the garden he necessarily conceals it? - Not necessarily because you can part with it to somebody else, but that is not concealing it.
114. Presumably, his object in parting with it would be to prevent the Trustee or Official Receiver getting it? - (Mr. Sherwell): Which is covered by 8, which makes it an offence to prevent the production of a document. - (Mr. Paling): I should have said that preventing the production of a document means that he has to take some really active step. In preventing a police officer from executing his duty you have to take an active step, not merely a passive attitude.
115. Chairman: If he hands it over to his brother-in-law to take away, that is taking a sufficiently active step to constitute preventing production, is it not? - Not entirely. I can imagine a set of circumstances where a man permits someone to take away a book, that is parting with it, but it is not necessarily preventing the production or concealing. - (Mr. Parsay): It may be that the party to whom he has handed the document prevents the production of it.
116. Do you not think the principle of "qui facit per alium" would apply? - Most of these offences you must remember are dealt with summarily.
117. Mr. Emerson: We thought that the Section was capable of simplification. You would agree with that? - (Mr. Paling): I would agree that the whole of these criminal provisions are capable of simplification in the form of redrafting. - (Mr. Parsay): What we rather felt was this, that so far as there are offences created by a breach of these paragraphs they should be retained, but the matter could be simplified by erasing any overlapping, and it might be possible to put the whole of the offences into, say, one, two or three paragraphs.
118. Chairman: In order not to have unnecessary overlapping? - (Mr. Paling): Yes, I do not think we want unnecessary overlapping.
119. You would be in favour, if possible, of eliminating overlapping? - Yes, provided the existing offences are retained.
120. Mr. Emerson: And with the onus on the same foot all the time? - Yes, with the onus on the same foot because the Act has both.
121. Chairman: One suggested method of possible simplification was this. Most of the offences in Section 154 have to be completed within 12 months, and a few are extended to two years by the 1926 Act. Do you think it would be practicable and desirable to make it a level two years throughout? - If you were considering subsection (4) of Section 158 as altering subsections (9), (10) and (11) of Section 154 to two years, there is a distinction. Section 158 deals with anybody who is carrying on a trade or business, whereas Section 154 applies to any bankrupt. I feel that there ought to be some distinction as regards the length of time in relation to people who are carrying on a trade or business and a bankrupt who is not carrying on a trade or business. There is no provision in the Act which requires somebody who is not carrying on a trade or business to keep any books at all.
122. I do not quite see why there should be a distinction between traders and non-traders as regards the period of one year and two years. I quite agree that the non-trader and non-businessman is not obliged to keep any books at all, but if he does keep books and falsifies them, to take one example, I do not quite see why it should not be two years in all cases. - I think the only difference is that a person who is engaged in trade or business has to keep books for two years by Section 158(1), as amended by Section 7 of the 1926 Act, whereas a person who does not engage in trade or business should have a less period of time in which to account, as indeed he would have to, under (8), (9) and (10) of Section 154, because the onus is then upon him.

123. Mr. Emerson: But it is only if they have actually been engaged in a trade or business that this period of two years applies, does it not? - If you have not been engaged in trade or business Section 158 would not apply, but Section 154 applies and that is 12 months.

124. Mr. Lloyd Williams: If they commit any of the offences under Section 154 why should they be better off so far as time is concerned? Why should a non-trader be any better off than a trader if he destroys, conceals, mutilates or falsifies any document just because he happens not to be carrying on a trade? - Not being a person in respect of whom a receiving order has been made at the moment I am perfectly entitled to conceal, destroy or mutilate my books, but if within the next 12 months I become bankrupt, then I can have committed an offence unless I can prove I had no intent to conceal the state of my affairs or to defeat the law, but if I am a trader then the period of time is two years.

125. Chairman: But do you think there is any valid reason for that distinction? - (Mr. Peling): The bankruptcies of people who are not engaged in trade or business are usually smaller. - (Chairman): That may be, but it does not seem to me that is, in itself, a reason for giving one a different period than the other.

126. I wonder if I might ask one other general question, which does not really arise out of the Director's memorandum. There are several Sections which contain monetary limits. Have you any views about monetary limits in general? - The one that did occur to me as requiring alteration was Section 159, that is, that a bankrupt quitting England and taking with him property to the amount of £20 or upwards should be guilty of a felony. It seems to me that any person who leaves England nowadays must take with him property to the extent of £20 even if it is only the clothes he wears. Generally speaking anybody who leaves the country takes more than £20 with them.

127. I do not see why because it will not purchase what it used to, a man should be entitled to steal £20, or even a larger sum. - (Mr. Parsey): I have often wondered why there are those monetary limits in these Sections. The offence in Section 155(a), for instance, is obtaining credit to the extent of £10 or upwards without revealing that one is an undischarged bankrupt. In fact it is the equivalent of stealing £10 of the creditors' money. I have never understood why the limit is there. - (Mr. Peling): On this question, if I may come back to Section 159, which is the one about taking out of the country £20. To do so is a felony, but if a man has gone abroad with £21 I do not think for one minute that he would be extradited for it, if that were his only offence. At the moment, if you go out of England taking with you property which ought by law to be divided among your creditors, which amounts to £19, 19s. 11d. you commit no offence under this Section.

128. Would you suggest abolishing the felony section altogether and relying on the misdemeanour section? - No, I think felony is an advantage because it assists in the question of extradition. You see, the extradition treaties with most countries enable you to claim extradition for frauds by bankrupts, in a broad term such as that, and if we can say, as we have done once or twice in the past: "This is a felony in this country", then we are much more likely to get surrender from the foreign state.

129. It has a practical value? - Yes.

130. The most important monetary limit in practice is in Section 155, obtaining credit? - Yes.

131. Ought that in your view to be increased having regard to the fall in the value of money? - (Mr. Parsey): Our view is that it ought not to be increased. Nowadays there are a large number of small traders and I do feel that they deserve protection. If the bankrupt is a perfectly honest man there can be no objection to him saying: "Well, I am an undischarged bankrupt". If he is dishonest, of course, he tries to keep quiet about it.

132. Is that your view too, Mr. Paling? - (Mr. Paling): I would concur.
133. Some of us are not quite clear if, in preserving Section 159 for the purposes of extradition, you want to increase the figure of £20 or leave it? - (Mr. Paling): I have no strong views on it one way or the other.
134. Mr. Sherwell: The offence is really taking out of the country any property which ought to be divided amongst his creditors, so we do not want any amount, do we? - That depends, does it not, as to whether or not you agree with the suggestion put up in the Director's memorandum that prosecutions should only be by the Board of Trade or by or with the consent of the Director. At the moment, prosecutions are, to a certain extent, open to the wide world - anybody can prosecute for a bankruptcy offence, although they do not do so in practice.
135. Chairman: How does that affect the question of whether you want any monetary limit under Section 159, or, if you do, whether you want to preserve the £20? - For this reason, that otherwise you might get applications from private persons, vindictive persons, to take proceedings, particularly where people have quit the country.
136. A vindictive person would say: "He has gone out of England and taken 6d. of my money and I want to prosecute him"? - Yes.
137. You would be in favour of keeping the limit as it is? - If you are going to put in no prosecution except by the Board of Trade, or by or with the consent of the Director of Public Prosecutions, then take the monetary limit out.
138. If we are not, then you want to preserve the monetary limit? - If it is going to be open to anybody to prosecute then I think you ought to have the monetary limit.
139. The same monetary limit? - Yes.
140. Another general matter; do you think the punishments open for offences under the Act are adequate, or do you think some or any of them should be increased or changed? - (Mr. Parsey): We always feel that the appropriate penalty for bankruptcy offences is something other than a fine. As you know, from the time of the Summary Jurisdiction Act, 1879, it has been possible for courts of summary jurisdiction to impose a monetary fine in place of the penalty, provided by the Act, of imprisonment, and that is now contained in Section 27 of the Magistrates' Courts Act, the limit being £25. Reading the Bankruptcy Act and looking at other Acts which were passed about the same time you do find this very big distinction, that in the Bankruptcy Act the only punishment for summary offences is imprisonment. I have no doubt that the Legislature had in mind that there was a strong probability that imprisonment would be imposed. Whether the other side of it was completely overlooked or not, I do not know, but we felt that the proper punishment was something other than a fine. In fact, we go so far in the majority of cases - not all but the majority - that we do not even ask for costs when we are prosecuting before courts of summary jurisdiction because we take the view that the money should go to the creditors.
141. Do you think there ought then to be some express provision in the Act at least to discourage courts from imposing fines on insolvent persons, if not to prohibit it absolutely? - It would be extremely helpful. You no doubt know the situation that arises now. You go to the Stipendiary Magistrate in Liverpool and he sends the fellow to prison for three months when he obtains a series of credits over £10. You go to Ripon and the magistrates very nearly give the chap something out of the poor box. If there could be some indication to courts that the appropriate penalty was something other than a fine I am sure it would be helpful. I do not know whether the Committee would go so far as to use the powers in the Magistrates' Courts Act by putting something in the Bankruptcy Act which excluded the possibility of imposing a fine - that can be

done. I must say we all agree about this and we do put that forward as a matter for consideration.

142. Do you consider the terms of imprisonment are adequate, or do you think they should be increased? - No, we think they are adequate.

143. You do not think that if there was some provision put into the Act to preclude Courts from fining these people it might have the effect of deterring them from convicting them at all? - I do not think that, but I think there might be a greater number of cases in which there would be some form of conditional binding over, which is right.

144. What we want to prevent is fines being imposed which, if they are paid at all, are either paid by a third party or really by the creditors? - Yes, and if the case is of such a nature that it does not warrant a term of imprisonment, well then there is the appropriate remedy.

145. You think the Courts would have recourse to that remedy, saying: "We will give him the benefit of the doubt", or something of that sort? - I think so. - (Mr. Paling): I think it is very much better that a Court should give a conditional or absolute discharge to a man whom they have convicted rather than fine the creditors £100. - (Mr. Parsey): And, after all is said and done, a conditional or absolute discharge does count as a conviction.

146. Had you given any consideration to the proposed scheme of bankrupts automatically being discharged at the end of two years unless a caveat is put in? - That is really not our side, but I was wondering whether it would be possible for courts of summary jurisdiction, who had dealt with a bankrupt for a bankruptcy offence, to make certain that that fact is brought to the notice of the Bankruptcy Court at the appropriate stage through the Official Receiver. It would be perfectly simple for machinery to be worked out in relation to that if the Board of Trade or the Director are the only bodies who are going to prosecute.

147. Is it for that reason you are so keen that the Board of Trade should at least know of all prosecutions? - That is a reason.

148. Are there any other reasons; it does not seem a very strong one in itself? - (Mr. Paling): There is the general reason, of course, that it is much better that policy as regards prosecutions for bankruptcy offences should be controlled, and we have found in a number of cases the police, for example, launch a prosecution against a man for a bankruptcy offence as a makeweight for some other offence for which they have in fact already taken proceedings.

149. I see in the Director's memorandum he refers to that practice as being "occasionally adopted". As a matter of fact, it is quite frequently adopted in practice, is it not? - (Mr. Parsey): Perhaps I could explain, as I had a word with the Director himself about this and it was as a result of our discussion that the words "occasionally adopted" were put into the memorandum. One of our difficulties was we could not say there was a lot because we did not know. On the information that we had, it was occasional, but we certainly had reason to think there was a good deal more of it going on than we hear about.

150. Three years ago I had experience as a Commissioner of Assize and I think in the few towns I went to, there was one such case each time of prosecutions by the police for offences under the Larceny Act. - These cases never get reported to us. - (Mr. Paling): We enquired of, I think it was, half a dozen large police forces who told us that they had two or three cases in the last two or three years.

151. Do you not think that in almost all, if not all, cases where somebody other than the Board of Trade prosecuted a man, the Official Receiver would necessarily get to know, because the bankruptcy, or at least the receiving order, would have to be proved? - No, as the proof of the bankruptcy is furnished by the court official from the Registrar's Office and not by the Official Receiver.

152. Supposing we decided to retain the right of a private person to prosecute, would it meet the case, do you think, if we suggested a proviso that, before he lays the information, he would have to give notice to the Board of Trade stating the particulars of the offence for which he proposed to prosecute? - (Mr. Paling): So many days' notice? - (Chairman): Not necessarily so many days' notice, but notice in writing stating the particulars of the offence and why he proposed to prosecute. - (Mr. Paling): I can see difficulties there at once by reason of the Magistrates' Clerk saying: "You must prove to me that you have given notice according to Section so and so before you lay this information".
153. Would that be an insuperable difficulty? - (Mr. Parsey): It would probably mean that somebody from the Director's Office or the Board of Trade would have to attend Court.
154. He could produce to the Magistrates' Clerk a letter from the Board of Trade acknowledging his notice, could he not? - (Mr. Parsey): What is the purpose of giving notice? - (Chairman): To ensure that the Board of Trade know that the prosecution is taking place, which I understood was something the Board of Trade were very desirous of having. - (Mr. Parsey): That is only one of the points. It would not control the policy of the prosecution.
155. No, I agree, but at least makes reasonably certain that the Board will know when a private person is prosecuting somebody? - If it is decided that it must be possible for private persons to be allowed to prosecute then I think that suggestion would be very helpful.
156. I gather then you would rather see the right to prosecute confined to the Board of Trade and possibly the Director? - Yes. - (Mr. Paling): I think it is important to have the Director in because some people would go to the Board of Trade and say: "We want you to prosecute", and if the Board of Trade say "No" it gives them a court of appeal, as it were.
157. Mr. Sherwell: Why should not a private person have the right to prosecute? - Under the Act as it stands, if there is an order to prosecute, only the Director can do it, unless the case is a summary one, in which event only the Board of Trade can do so. If, as I think the Director suggested in his memorandum, you are going to do away with this order of the court, in the same way as the right of the Bankruptcy Court to commit for trial has been abolished, then there must be some sort of limitation. Obviously the legislature in 1914 intended there to be some limit of some sort upon prosecution, and that was the limit that they put in in those circumstances.
158. Mr. Emerson: You do not think that a trustee in bankruptcy, with the sanction of the Committee of Inspection, should be empowered to bring prosecutions? - If he goes to the Director, says: "I would like to prosecute", and does so with the Director's consent. Having had some experience of cases which have been submitted by trustees at the request of the Committee of Inspection I do feel that there should be some form of control of prosecutions, however slight.
159. Chairman: If that were so, would you have any objection to private prosecutions, provided the consent of the Director was first obtained? - No. We suggested in the memorandum that prosecutions should be by or with the consent of the Director.
160. Mr. Emerson: That would give the Director power to veto the prosecution which was decided on by the trustee. It would give a power of veto, would it not? - Yes.
161. Mr. Lloyd Williams: It would only arise because the Director may come to the conclusion that there is not sufficient evidence on which a conviction could be obtained? - (Mr. Emerson): Or that it is too trivial in his opinion. - (Mr. Parsey): Or that it is vexatious. - (Mr. Paling): Sometimes we get the type of case, where a man who is believed to have committed fraudulent conversion of considerable sums of

money and a creditor who is eager for a prosecution looks at it merely from the position: "I have lost money and I want this man prosecuted". That is a right and proper attitude of mind, but we are looking at the case as a whole and we say: "Inquiries into this are going to take a long time - they must do - we have to trace money, trace banks, trace deeds, all kinds of things; you let it be, you let it lie. After all he has only just filed his statement of affairs and has not had his Public Examination yet. You let us make our inquiries and we can then present the case to the court as a whole complete picture". Otherwise the case might be very seriously prejudiced from the point of view of a proper prosecution if a creditor rushes in and prosecutes on only one aspect of the case.

162. Chairman: And the result might be a premature prosecution by an impetuous creditor which might give the bankrupt a plea of autrefois acquit by the time the case is completed? - The evidence that we require may not then be available because it may have disappeared by that time.

163. The danger is that your furious, impetuous creditor rushes in, prosecutes and fails to secure a conviction? - Or, even if he secures a conviction, it is for what may be described as a comparatively minor offence. I do not want any member of the Committee to think that the Director sits in his office and says: "You shall not prosecute". If a creditor comes along and says: "Look, this is a case and I want to do this prosecution myself", and we are satisfied that the evidence is sufficient and there is no reason why he should not prosecute we say: "Certainly, by all means". If the creditor would like to do that prosecution it saves the public money. But usually we find that creditors come along and say: "Look, you are a public official, you do this case, go on, get on with it, hurry up, go and arrest him tonight".

164. Mr. Emerson: But you still want the power of veto? - I would much prefer to say the power of consent.

165. Mr. Bear: Is there any parallel legislation where the Board of Trade and the Director do have these powers of refusing consent? -
(Mr. Parsey): There are similar provisions in the Companies Act and the Prevention of Fraud (Investments) Act. There are lots and lots of them. -
(Mr. Paling): They range from incest to iron and steel; from prevention of fraud to falsification of accounts of different kinds; from local government to lunacy.

166. Mr. Sherwell. When a man is convicted of any bankruptcy offence is a certificate of conviction sent to the Official Receiver or the Trustee nowadays? - (Mr. Parsey): What happens now if the Board of Trade prosecute is that we always send a report of the result of the prosecution to the Official Receiver.

167. Chairman: Would it be a good idea, do you think, to put into the Act a provision that any Court convicting a person of an offence under the Act should certify that, either to the Official Receiver or to the Court in Bankruptcy? - I do not think that is the answer. It is putting rather a lot on the Clerk of the Court. If there is an amendment to the effect that nobody except the Board of Trade or the Director can prosecute unless they first give notification of the prosecution, then the case could be followed up and the Official Receiver could be informed of the result.

168. Mr. Lloyd Williams: If the Director gave his consent to the prosecution he would naturally follow it up and see what the result was? - He would probably inform me and I would follow it up.

169. He would require the private person to notify him of the result of the prosecution? - Yes.

170. Even if a private person prosecuted with the consent of the Director? - Yes.

171. I do not see why you want notification of the impending prosecution as long as you get notification of the actual conviction at the end. You do not worry about a prosecution if a man is acquitted? - Even if a man is acquitted and the prosecution is a private one it is of interest to the Board of Trade. It is of particular interest to my Prosecutions Department, because naturally one wants to know the ground on which the defendant was let off. It all assists in future decisions as to what sort of cases one should take. If there are private prosecutors, they may fail in their prosecution, when there might be a perfectly proper case to take to a Divisional Court. A private prosecutor would probably never even consider doing that - it would probably be ruled out on grounds of expense - whereas the Director or the Board of Trade would have that possibility very much in mind. That is another reason why I think it really is advisable for all prosecutions to be kept in our hands, and that, if there are to be private prosecutions with the consent of the Director, we should know about them so that, if necessary, the Director could act.
172. Chairman: But you would still like to have this proviso, with the Director's consent, even though a caveat could be applied for at any time within two years? - Yes.
173. And you would not want the criminal court to have power to enter a caveat? - (Mr. Paling): I think that is going outside the province of the criminal courts.
174. Would you agree that the existing power of the Bankruptcy Court to direct a prosecution is out of place? - It is not suited to carry out that particular function. There have been cases in which the Court has ordered a prosecution, the papers have been sent to the Director of Public Prosecutions, enquiries have been made which reveal either that no offence has been committed or that there is clearly insufficient evidence, and we have considerable difficulty in convincing the Bankruptcy Court of that fact.
175. Perhaps we might now turn to one or two other matters in the Director's memorandum. I see he says that he thinks the drafting of paragraph (16) of Section 154 could be improved. We do not see very much wrong with that. That is the one which says: "He is guilty of any false representation or other fraud....." - It is the use of the word "guilty". The difficulty is, when you come to frame your charge or lay your information, what form of words are you going to use. The defendant, in this case, receives a summons saying "For that you are guilty of a false representation....". Quite apart from the fact that he does not understand it, he says: "Why am I being tried if it is said I am guilty?".
176. I think the Director also makes some observations on Section 156? - (Mr. Parsey): The difficulty about Section 156 is to make up one's mind whether the offences are pre- or post-bankruptcy.
177. Do you not feel they may be intended to be both? - We do feel that, but it is not abundantly clear from the wording. - (Mr. Paling): That offence is covered in the same language by the Debtors' Act.
178. Some of the offences mentioned in Section 156 must, at all events, be pre-bankruptcy. You can only connive at an execution before bankruptcy. - (Mr. Herkin): We had a case recently on appeal from conviction in a lower court; it was a pre-bankruptcy offence but the appeal was allowed on the grounds that the Section related to post-bankruptcy offences. It was a Section 156(a) offence, but the same argument applies to both; there is the same wording for both offences.
179. I see that the Director thinks it should be possible to prosecute people for offences under Section 160 summarily as well as on indictment. Have you any observations on this? - (Mr. Paling): Is there any reason why it should not be tried summarily? The offence does not seem very serious.

180. Do you not think it is the most serious of the bankruptcy offences? - It is not an offence by a bankrupt. I think I am right in saying that in this group of offences it is the only one that is not.
181. That is quite true; but do you not think that, in a way, it is rather worse for a person who is not up against it to put forward a false claim and try to cheat the other creditors than it is for a bankrupt to conceal, say, the ancestral silver? - Yes; but that is a matter of punishment, and under Section 160 the punishment is only one year. Under Section 164(1) the summary court have power for any offence to award exactly the same punishment.
182. Do you not think the punishment under Section 160 ought to be stopped up? - On indictment, yes. I see no reason why it should not be the same as Section 164(1), two years, or whatever the figure is on indictment, and twelve months, or whatever the figure may be for summary jurisdiction.
183. If we proposed to leave the penalty on summary conviction the same as it is, but to increase substantially the maximum punishment on indictment, would you be in agreement with that? - Entirely. - (Mr. Parsey): Absolutely.
184. We have been considering the rather extraordinary terms of Section 164(3); I do not know what you would think of doing about that subsection. Would you be in favour of cutting it out altogether or trying to make some sense of it? - (Mr. Paling): As it stands it is a direction to a court of summary jurisdiction to take into consideration evidence which would tend to show that the act was not committed with guilty intent. Reading the Section as it stands, does that mean that courts other than summary jurisdiction courts are not to take that into account? - (Mr. Parsey): That Section seems to be intended to apply to the penalty and not to any question of conviction, because the Sections that deal with the penalties already suggest that the Court has to be satisfied about guilty intent. - (Mr. Paling): There is no suggestion in Section 155 that there is any guilty intent, or in Section 157. - (Mr. Workin): I do not see how a man could gamble with guilty intent. He surely will not gamble with intent to defraud his creditors.
185. At all events, as regards sentence, it is the duty of any Court to take such evidence into account. I gather you are in favour of cutting it out? - (Mr. Parsey): Definitely. - (Mr. Paling): I see no purpose in putting sermons in Acts of Parliament.
186. We thought of suggesting a provision, I think much what the Director had in mind, as regards venue, that prosecutions could be started in a court of summary jurisdiction for either the place where the offence, or any one of the offences, had been committed; where the accused ordinarily resided or carried on trade or business for six months; or where the receiving order is made. Would that be adequate? - (Mr. Parsey): Yes, adequate. - (Mr. Paling): There is one point; according to this you do not give jurisdiction where the debtor may be at the time of the issue of criminal process.
187. If we added, "where the debtor is", would that cover it? - Where he may be. There are a number of Acts of Parliament which give jurisdiction to where the defendant may be. The advantage of that is that sometimes the defendant, who has moved perhaps from the north to the south of England, admits his offence; there is no need to call witnesses and you do not want to drag the man up from Plymouth to Newcastle merely for the purpose of putting him before the justices for them perhaps to inflict what may be a minor penalty, for example, a conditional discharge or something of that sort. There is one other suggestion. Where there are two or more persons to be charged with the same offence, in different jurisdictions, there may be different venues.
188. Where the accused or, if there are more than one accused, any one of them - that would be what you wanted, would it not? - If you would refer to the Magistrates' Court Act, 1952, Section 1(2)(b), "A justice of

the peace may issue a summons or warrant if it appears to the justice necessary or expedient with a view to the better administration of justice that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence and who is in custody or is being or is to be proceeded against within the county or borough".

189. That would seem to make it unnecessary to say anything about the ease of more than one accused. You could put in a provision that the prosecution can be launched at the place where the accused happens to be at the time the process is launched. Then you could get any other person in under that Section? - If you have a bankruptcy in Newcastle and there are two people involved in a criminal offence arising out of that bankruptcy, one is in Yarmouth and one is at Torquay, you have to bring both of them to Newcastle to try them. If you have a jurisdiction where the defendant may be, each one can be tried separately at Torquay or at Yarmouth, but you have got to get them together. If one of them has been arrested for some other offence at Yarmouth, and the bankruptcy offence is discovered, it is convenient to be able to charge him with the bankruptcy offence there and bring the man from Torquay to Yarmouth to be dealt with in that Court.

190. In the case you have put the Yarmouth court would have power to bring the man from Torquay? - Yes.

191. If we included your suggestion that the summary proceedings or any criminal proceedings could be commenced at the place where the accused happens to be, and somebody else is jointly involved, he can be brought to that Court by virtue of Section 1(2)(b), it would not be necessary to put anything in the Bankruptcy Act? - But he cannot be if it is going to be dealt with summarily, because there is a proviso under the Magistrates' Courts Act which says that a summons shall not be issued by virtue of paragraph (c) of the sub-section.

192. Then we shall need to say something about two or more accused persons? - Where it is not an indictable offence.

193. There is one criminal offence under the Deed of Arrangement Act which is not mentioned in the Director's memorandum; it is in the Section which provides for the case of the trustee who pays more to one creditor than to another without sanction. Have you got any views about that? - There is no penalty clause under that Act.

194. We thought we would have to put one in. - That would mean that a trustee who commits an offence under Section 17 can only be dealt with on indictment, and the maximum penalty is imprisonment.

195. We thought of adding the words "and liable on conviction on indictment to imprisonment for any time not exceeding two years and on summary conviction to a term not exceeding twelve months". Do you think that is adequate? - Yes. I do not recollect any prosecutions under that Section.

196. I am told there has never been one. But I was a little doubtful myself whether two years is adequate on indictment; it is a pretty naughty offence. But if nobody has even been prosecuted for it then it does not much matter what you put in. - Usually I should have thought with an offence under that Section the trustee would have committed some other offence as well. It looks as if there would be a conspiracy charge as well.

197. Or fraudulent conversion by a trustee. Could it not be accepted that fraudulent conversion by a trustee would cover most cases under that Section? - It may be.

198. Do you think then that two years on indictment and one year on summary conviction is enough? - Quite. The purpose of this Section is to prevent the commission of the offences, not to punish the people who commit them. The mere fact that it is in the statute deters people who might feel induced to do it.

199. It seemed to us that some of the maxima which can be awarded by way of punishment on indictment under the Bankruptcy Act went stepping up. What we thought of doing was suggesting putting the punishment for the felony up to a possible seven years and for some of the misdemeanours up to five, the remainder being kept at two years. The only felony, you remember, is going out of England with property. It seemed to us that the felony in some cases might be a very bad offence; it is at least as bad as stealing. Do you think it is worth trying to sort out the maxima in that sort of way, or do you think it should just be left as it is? - (Mr. Parscy): The only thing I am doubtful about at the moment is not keeping proper books of account. That is Section 158. At one time the penalty one got summarily for that offence was £2 or £4. We have been working extremely hard to see that Courts do impose a proper penalty; it is a very serious offence, I think. If proper books are not kept it means it is almost impossible for the circumstances of the bankruptcy to be sorted out. In recent months we have most fortunately been getting quite substantial terms of imprisonment on charges of failing to keep proper books.
200. Under Section 158 at the moment the maximum is two years. Do you think there would be a case for increasing that? - I think so. It might be just an individual view, but I have always thought it is a much more serious offence than is generally supposed. We have discovered that from dealing with these cases.
201. One has got to keep some sort of proportion between an offence which is merely not keeping books and what I am sure you would agree is worse, the case of falsification or concealing of books. - I entirely agree. It is very seldom we have a prosecution for concealing; it is nearly always under this Section of failing to keep proper books. But it is such an advantage when you are asked what the penalty is, and you are able to say "On indictment five years". The Court begins to think "Well, they really consider that this is a serious matter".
202. Mr. Boor: There must be perfectly honest people who do not keep books of account - it is probably very common indeed - where there is no dishonesty and they never go bankrupt? - There may be. - (Mr. Harkin): We are constantly getting this point brought up in prosecutions, that this is retrospective legislation.
203. Chairman: I think that is what we felt, and we decided not to put the penalty up, because one rather hesitates to make a man liable to a substantial term of imprisonment for something which, at the time he omitted to do it, was not an offence in itself at all. - (Mr. Parscy): He has always got his let-out under the proviso. But I just put it forward as something which might be worthy of consideration.
204. I do not know whether there are any other points you wish to make. - There is one thing we have not dealt with. I do not think we dealt with Section 164(2), that is the one that says summary proceedings in respect of any such offence shall not be instituted after one year from the first discovery thereof by the Official Receiver or by the trustee. That does cause some difficulty with the summary proceedings, and we really wondered whether it would be possible for you to consider some provision such as subsection (1) of Section 442 of the Companies Act. That gives the time limit for summary offences as being twelve months from the date on which evidence sufficient in the opinion of the Director or the Board of Trade to justify proceedings comes to his or their knowledge. Frequently there is a lot of work to be done by the Official Receiver before the papers even come to my Department, and not infrequently cases arrive which should be dealt with summarily but are out of time for summary proceedings because of that provision.
205. Is there in your view any reason why one limit should apply to summary proceedings and another to proceedings on indictment? - There is never any time limit to proceedings on indictment.

206. What about the proviso to Section 442; proceedings - it does not say summary proceedings - shall not be taken more than three years after the commission of the offence. Would you be in favour of that overall proviso, not more than three years from the offence? - (Mr. Paling): I had not considered that, but this wording which is reproduced in Section 442 of the Companies Act is lifted from a number of previous Acts of Parliament. In the Exchange Control Act, summary proceedings are limited to a time when evidence comes to the notice of the Treasury; in the Dangerous Drugs Act, when evidence comes to the notice of the Secretary of State, and so on. There are a number of Acts of Parliament like that, and the Companies Act merely followed in line. The suggestion was that the Bankruptcy Act should also follow on in the same vein. That is the modern tendency for legislation.

207. I read the proviso as applying to all proceedings; it is true the previous paragraphs relate to summary proceedings. - (Mr. Paling): At present under the Companies Act, 1948 it is summary proceedings which are limited to three years.

208. Are you in favour of keeping that? - Yes, we see no reason for changing it.

209. Have you any other observations? - (Mr. Paling): The only other observation I had to make was that when we first started this afternoon you asked me whether any of the offences under Section 154 might be deleted, because perhaps they might overlap other offences in the Section and in other Acts. If I might just say this on that point. I think I am right in saying that a person convicted of an offence under the Bankruptcy Act is in a different position from a person who is convicted of an offence under some other Act of Parliament, when his discharge has to be considered. The County Court judge in the Bankruptcy Court, when deciding whether or not he shall grant a discharge, does not take into account the fact that the man may have been convicted of some offence under some other Act of Parliament; but he would if it was under the Bankruptcy Act. Therefore although you do get offences under the Bankruptcy Act which appear to be exactly the same as offences under some other Act of Parliament, when committed by a bankrupt they become important when the question of his discharge is to be considered.

210. The Court considering the discharge would, of course, have no business at all taking consideration of the fact that the man had been convicted of riding a bicycle without a light? - But if riding a bicycle without a light was an offence under the Bankruptcy Act, then they would.

211. Thank you very much for your very helpful evidence.

(The witnesses withdrew)

THIRD DAY

Wednesday, 18th April, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EDMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PRICE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

LETTER RECEIVED FROM MR. KENNETH RUSSELL CORK, P.C.A.

Messrs. W.H. Cork, Gully & Co.,
19, Eastcheap,
London, E.C.3.

15th December, 1955.

B. MacTavish, Esq.,
Joint Secretary,
Bankruptcy Law Amendment Committee.

Sir,

I am in receipt of your letter of the 2nd November, and have pleasure in setting out below my views upon the specific matters mentioned in your letter, and also upon a number of other matters in the current Bankruptcy Law, upon which, in my view, some amendment is desirable.

1. I agree that some simplification is required in the provisions for discharge of bankrupts, and would refer specifically to the scheme outlined in the appendix to your letter.

A. I agree that an automatic discharge of bankrupts after two years from the conclusion of the public examination is reasonable, subject to the clarification mentioned below. It should, however, be borne in mind that Bankrupts who apply for their discharge under present legislation frequently agree to make future payments as a condition of discharge and Creditors may thus lose considerably by this proposal. I would therefore suggest that the Bankrupt should be required, three months before the expiration of the two years, to file an affidavit as to his financial position, earning capacity etc. The Official Receiver or Trustee should be entitled to apply to the Court during these three months, that the Bankrupt be ordered to make some future payments after discharge as a condition of having the benefit of automatic discharge.

B. If this proposal were accepted, I think that the Trustee as well as the Official Receiver or Creditors, should be entitled to apply to the Court that a caveat should be entered. There should however, also be a provision whereby the Official Receiver, or the Trustee can apply to the Court for the entry of a caveat at any time during the two years in which the bankrupt remains undischarged, since it frequently happens that information comes to light well after the conclusion of the Public Examination, which, if it were known earlier, would undoubtedly have led to the application for a caveat at the conclusion of the Public Examination. If a Trustee wished to enter such caveat after the conclusion of the Public Examination, notice thereof would then be given to the Official Receiver and to the Bankrupt and the Court would then fix a day, time and place for the

hearing of the bankrupt's discharge, and make such order as the Court thinks fit.

C. I agree that a six monthly report should be made by bankrupts whose discharge was refused by the Court and there should be some provision for a penalty in the event of failure to comply with this provision.

D. I agree that a bankrupt should be entitled to apply to the Court that his discharge should take effect before the expiration of two years from the conclusion of the Public Examination, and that in that event, the application should be dealt with in the same manner as under the existing provisions.

E. I agree that it would be desirable that provision should be made for the automatic discharge of all existing undischarged bankrupts, provided that they had not been bankrupt on more than one occasion, and the Court had not refused their discharge, but provided also that such automatic discharge should not take effect earlier than two years from the conclusion of the Public Examination. This is particularly important in the case of bankrupts whose Public Examination has been adjourned sine die because of their unsatisfactory conduct.

2. In my opinion, assets acquired by an undischarged bankrupt should be available for distribution to the Creditors of a second or subsequent bankruptcy, in priority to any debts remaining owing in the prior bankruptcy, provided that firstly, the liabilities in the second bankruptcy were incurred wholly or partly in the acquisition of such assets, and provided also that Creditors who had knowledge of the fact that the debtor remained undischarged from a previous bankruptcy, should be excluded from such prior distribution, but should rank *pari passu* with the Creditors of the first bankruptcy in the event of there being a surplus after the claims of the other Creditors have been discharged in full. It should also be made clear that this priority applies only to assets acquired before the date of the second bankruptcy as there seems no good reason why it should extend to assets acquired after that time. If, for instance, the bankrupt benefits under a Will after his second bankruptcy, the Creditors of both the first and second bankruptcies should share such benefit rateably.

3. A. In my opinion, there is no necessity to increase the limit of £50 upon which a Petitioning Creditor's debt can be founded as I do not think that the present limit gives rise to any abuse of the process of the Court.

B. I do not think that the estimated value of assets which enable the Court to make an order for summary administration should be increased above the existing limit of £300, because in my view, Creditors should always be entitled to have an unrestricted discretion regarding the person whom they wish to be appointed as Trustee of the Estate.

C. In my opinion, the only monetary limit which requires an increase is that contained in Section 38(2) of the Act, since a limit of £20 for a bankrupt's tools of trade, wearing apparel and bedding is obviously entirely inadequate, and is not, in fact, now being observed. In my opinion, this limit should be increased to at least £100.

4. I agree that after-acquired property should not vest in the Trustee unless and until it is actually claimed by him.

5. I agree that Creditors should have unlimited discretion as to the person they want to be appointed as Trustee, and this should include the Official Receiver.

6. In my opinion, a documentary transfer by the Trustee of any surplus to the bankrupt after his debts with interest have been paid in full, is absolutely necessary since otherwise a bankrupt might be able to take over from a Trustee all assets in the hands of the Trustee, as soon as the dividend and interest have been paid, without allowing sufficient time for the Trustee to satisfy himself that he has also discharged all

costs and expenses of the administration of the estate. I think it is therefore important that the Trustee should himself be able to decide when he is able to transfer the surplus back to the bankrupt. Any alternative provision would lead only to delay in the actual payment to the Creditors.

7. I agree that the provisions of Section 51 of the Act should be extended to cover all manners of earnings, including those of workmen, and those not earned under a contract of employment. In my view, at present a number of bankrupts escape the provisions of Section 51 who are well able to make a contribution to their assets out of current earning, particularly where such earning consists of fees and remuneration under short-term contracts.

8. In my opinion, it should be possible for prosecutions for offences under the Bankruptcy Acts to be instituted either by the Board of Trade or by the Director of the Public Prosecutions. I have found, in my experience in connection with the liquidation of Companies where the Board of Trade have power to institute prosecutions that they have been unwilling to do so in some instances, where a prosecution was later successfully undertaken by the Director.

9. I am not aware, from my experience, that there is any need for a more effective control by the Board of Trade over the administration of assets vested in a Trustee under a Deed of Arrangement. It might be held desirable that a Guarantee Bond should be given by a Trustee under a Deed in any event, and I think that there should be provision in the Deed of Arrangement Act for the appointment of a Committee of Inspection to authorise the actions of the Trustee. It is, however, one of the advantages of Deeds of Arrangement that proceedings thereunder are quicker and less expensive, and I would not like to see those advantages whittled away.

10. Proofs of Debt:

A. The completion of Proofs is, at present, giving considerable difficulties to Creditors and the wording of such Proofs should be simplified so far as possible, and in particular, clauses C. and D. should be consolidated and the necessity for the deponent to the Proof for a limited Company being authorised to make the Proof under the Company's Seal, should be abolished. This necessity appears to be giving rise to considerable difficulties with modern extension of limited liability Companies.

B. Bankruptcy Rule 259 should be abolished, and Bankruptcy Rule 258 amended by omitting the words "when acting as Trustee" after "the Official Receiver" and substituting therefor the words "or the Trustee". It is at present proving quite unnecessarily difficult to compel a Trustee to deal with Proofs within 28 days after receiving it. This particularly applies to cases where a Trustee receives Proofs before the conclusion of the Public Examination, and is generally required to hand over all these Proofs to the Official Receiver to enable him to prepare for the Public Examination, and thus Proofs are frequently in the hands of a Trustee only for a matter of hours during the period of 28 days.

11. Proxies:

A. The Provision of Section 16 of the first Schedule to the Bankruptcy Act requiring proxies to be in the handwriting of the person giving it, should be abolished as it does not appear to serve any useful purpose, and only adds to the difficulties of the proceedings. It should be pointed out that there is no similar provision in the Companies Winding Up rules governing compulsory liquidation.

B. Similarly, there seems to me to be no reason why Section 18 of the first Schedule, dealing with the persons who may act as general proxies shall not be similar to Rule 149 of the Companies Winding Up rules, which state that a Creditor may give a general proxy to any

person. If this recommendation were accepted, it might be considered necessary to insert in the Schedule, a provision similar to that of Companies Winding Up Rule 153, but it frequently happens that a Creditor wrongly completes a proxy in favour of a person with a view to having such person appointed as Trustee to the bankrupt's estate. At present, this can only be dealt with by giving a special proxy, but I think that it is advisable that the holder of general proxy should also be entitled to vote for the appointment of himself, his partner or employer as Trustee, provided he discloses to the meeting of Creditors that he is so doing.

12. Trustee's Guarantee Bond:

The provision whereby the premium on a Trustee's Bond is chargeable against the estate only upon the authority of the Creditors or the Committee of Inspection should be abolished. Since this is only a matter of form, it can sometimes be overlooked accidentally at the first meeting of Creditors, and this can then easily give rise to unnecessary difficulties.

13. Committees of Inspection:

A. In my opinion, any resolution of a Committee of Inspection should be effective if it is either agreed to by a majority present at a meeting of the Committee, as at present, or alternatively if it is agreed to in writing by every member of the Committee. It frequently happens that there is difficulty in obtaining a quorum for a Committee meeting where members of the Committee are resident in different towns, particularly in the later stages of the administration of the Estate when members of the Committee have very frequently lost some interest in the matter.

B. Section 20(3) of the Act should be amended, omitting the words "and failing such appointment at least once a month". It is the normal practice to pass a resolution at Committee meetings that the Committee shall only meet at such times as either the Trustee or a member of the Committee consider desirable, and no-one wants to have a meeting monthly, merely because such resolution may have been accidentally omitted.

C. Section 20(8) should be amended so as to provide that a vacancy in the Committee shall only be filled upon the instructions of the remaining members of the Committee or if the number falls below three. There should also be a provision that a Creditor who has appointed an individual to represent him on the Committee, shall be entitled to remove that individual, and to appoint another in his place, either upon such removal, or for any other reason, without the necessity of calling a fresh meeting of Creditors.

D. Bankruptcy Rule 367 should be amended to provide for audit by the Committee of Inspection not less than once every six months, so as to bring it into line with audits by the Board of Trade. In practice, Committees have no desire to audit the Trustee's accounts more often, and it is difficult to get members to attend a meeting for that purpose.

E. There should, in my view, be a provision for payment to members of the Committee of a fee of not more than two guineas per meeting in addition to out-of-pocket expenses, in order to give them an adequate recompense for the time lost in attending meetings. Further, the practice whereby the payment of out-of-pocket expenses of the Committee of Inspection must be sanctioned by the Board of Trade before payment is made, should be abolished, as the powers vested in the Board of Trade on the audit of the Trustee's accounts to review such payments, seems quite adequate and such sanction merely adds to the work required both by the Trustee and by the Board of Trade.

14. Official Receiver's Costs:

Rule 351 should be amended so as to provide for a Trustee to give an undertaking to the Official Receiver to discharge all the Official Receiver's fees, costs and charges out of the first assets coming into the hands of the Trustee. At present, the Trustee may be required to advance such costs out of his own pocket before taking over the estate, and there seems to be no good reason why this should be so.

15. Powers of Trustee:

A. In my opinion, Section 83(4) of the Act and Rule 107 which require the prior sanction of the Committee of Inspection for the employment of Solicitors and Agents and the imposition of a limit of costs on work done by Solicitors, should be brought into line with Section 245(1) of the Companies Act 1948 and Rule 195(2) of the Companies Winding Up rules which are regarded as adequate protection in the case of compulsory liquidations. There appears no reason why the Bankruptcy rule should be more stringent, and this only gives rise to quite unnecessary difficulties.

B. In my opinion, there should be a provision in the Act that a Trustee should be entitled to pay out of the estate without the necessity of taxation, costs not exceeding a total of £10 in all, which would be required to be taxed if they exceeded £10. It frequently happens that there are very small charges, such as Auctioneer's costs in selling small quantities of furniture, or Solicitor's costs in issuing a writ against a single debtor for an undisputed debt, where at present, the rules requiring taxation are much too cumbersome in relation to the amounts involved. I have found in practice that Solicitors or Agents are frequently prepared to do this work free of charge in order to oblige a Trustee, rather than submit an account for taxation.

16. Trustee's Remuneration:

A. Section 82(1) of the Act should be amended to provide for payment to a Trustee of remuneration calculated on the amount distributed in dividend to Preferential Creditors where the assets are insufficient to pay a dividend to the Unsecured Creditors. A similar provision applies in the case of compulsory liquidation, and there is at present an anomaly in that it has happened within my experience that the Official Receiver before handing over the estate to the Trustee, may have realised virtually the whole of the assets, which were insufficient to pay the Preferential Creditors in full, and there were thus no funds upon which the Trustee's remuneration could be calculated.

B. Section 82 should also be amended so as to empower either the Board of Trade or the Court to fix the remuneration of the Trustee where there is no Committee of Inspection. Under present practice, if no Committee is appointed at the first meeting of Creditors, the fixing of the Trustee's remuneration may well be overlooked, or alternatively, the Trustee may still be required to convene a further meeting for the purpose of appointing a Committee, and the first meeting of Creditors may decide that such Committee shall fix the Trustee's remuneration. Where, in such event, there is not a quorum at the meeting called by the Trustee, as very frequently happens, there is then no provision in the Act under which the Trustee can be paid.

17. Control over Bankrupt:

In my opinion, there should be a provision in the Bankruptcy Act whereby the Court, on the application by the Trustee or the Official Receiver, shall have power to impound the passport of a bankrupt.

18. Payment of Dividend:

The present rules for the payment of dividends as governed by Rules 267 and 270 are unnecessarily complicated. These should be amended to provide for only one advertisement of notice of intention to declare a dividend, such advertisement to be in the London Gazette and in one newspaper, and thereafter the Trustee should be in a position to pay a dividend without further advertising. Notice should of course be given, at the same time as the advertisements are inserted, to the Creditors appearing on the Statement of Affairs who have not by that time proved their debts.

19. Special Managers:

The provision whereby a Creditor upon applying for the appointment of a Special Manager, is required to give an indemnity against ordinary losses which might be incurred by such Special Manager, should be abolished. It frequently happens that a Special Manager is appointed in order to carry on the business and preserve the valuable goodwill when it is well known that in the course of his trading, he might well incur a loss, which is nevertheless considerably smaller than the value of the goodwill, which would undoubtedly be lost if no Special Manager were appointed. It then seems unreasonable that there should have to be an argument between the Creditor and the Board of Trade as to whether the Creditor should be called upon to make good such loss.

20. Payments into Bankruptcy Estates Account:

In view of the fact that a Trustee is always required to give a guarantee Bond, he should be entitled to pay into a separate bank account sums not exceeding £2,000 which he holds for a period of not more than six months in order to enable him to make urgent payments out of the estate without the necessity of advancing such monies out of his own pocket, if the delay occasioned by making application for a Payable Order cannot be incurred.

21. Landlords:

A. The powers contained in Section 35(1) of the Act whereby a landlord can distrain after the commencement of the bankruptcy, should be abolished as there appears to be no good reason why a landlord should at that stage still be in a position to obtain any preference over the other Creditors.

B. Section 54 of the Act should be amended so as to provide that the liability of a Trustee for failure to disclaim should be limited to the assets in the hands of the Trustee.

22. Receiving Orders:

Considerable difficulty often arises with Creditors owing to the fact that a Registrar sitting in Bankruptcy does not possess the same discretion regarding the making of a Receiving Order as is possessed by a Judge on the hearing of a Petition for the Compulsory Winding Up of a Company. At present, a Creditor sometimes takes advantage of the fact that the general body of Creditors who may have been consulted and agreed to the debtor's affairs being dealt with either by a Deed of Arrangement, or some other manner such as a moratorium or informal scheme, will not permit such scheme to be upset by such Creditor standing out and petitioning for a Receiving Order. The Creditor may therefore use the machinery of the Court, not with the object of obtaining a Receiving Order, but purely to exert pressure to be paid out in priority to other Creditors. This appears to me to be fundamentally wrong, and an abuse of the machinery of the Court, since one of the objects of bankruptcy is to avoid the giving of a preference to a Creditor, whereas at present, this is often being encouraged. It is appreciated that there is at present more secrecy in the procedure leading up to bankruptcy than there is in a Winding Up Petition which has to be advertised, and if discretion were to be granted to a Registrar, some machinery would have to be introduced, whereby the Registrar is

placed in full possession of all the relevant facts. It is therefore suggested that a Debtor and his Creditors should be entitled to oppose the making of a Receiving Order on the grounds that some other method of dealing with the bankrupt's affairs is desired by the majority of Creditors. In that event, notice of intended opposition on these grounds should be given to the Court at least 14 days before the hearing of the Bankruptcy Petition, and the Debtor should at the same time be required to file on affidavit a Statement of Affairs in the form now required after a Receiving Order has been made. In such event, the Court or the Official Receiver should then notify all Creditors shown in the Statement of Affairs of a time and place for hearing the Petition, and this should also be advertised in the same way as a Winding Up Petition. This will give all Creditors, whether or not they have been disclosed by the Debtor, an opportunity to appear on the hearing of a Petition, and the present secrecy is then avoided solely on the instigation of the Debtor himself who is at present being protected by such secrecy. When this procedure has been followed the hearing of the Petition will then take place in Open Court under a procedure similar to that of Winding Up Petitions, and the Registrar would have power to dismiss a petition at his discretion if it is shown to him that this is the course desired by a substantial majority of Creditors.

23. Deeds of Arrangement as Acts of Bankruptcy:

At present a Deed of Arrangement constitutes an Act of Bankruptcy for a period of three months and it is therefore impossible for a Trustee under a Deed to deal with the bankrupt's assets during that period. Whilst this period can be shortened so far as known Creditors are concerned by giving them the notice under Section 24(1) of the Deed of Arrangement Act 1914, this does not of course apply to such Creditors as may not have been known at that time, and consequently this protection is not of any very great value. It frequently happens that one of the principal reasons why Creditors prefer a Deed of Arrangement to Bankruptcy proceedings is the fact that under such Deed the protection of the goodwill of a business and its consequent sale as a going concern is made very much easier. At the same time, however, it is still necessary for a Trustee under a Deed to carry on such business for a period of three months before he can give a clear title to a purchaser, and it may well be that considerable losses are incurred during that time. It is therefore suggested that the Deed of Arrangement Act should be amended so as to provide that a Trustee shall, with the sanction of the Committee of Inspection to whose statutory powers I have referred earlier in these submissions, be entitled to dispose of assets of the Debtor and give a clear and undisputed title to such assets to a purchaser during the period when the Deed is an available act of Bankruptcy, provided that he holds the proceeds of such sale intact, (subject only to the discharge of claims of Creditors who may hold a security on assets forming the subject of such sale) in a separate bank account during that period so that such proceeds are available to be handed over to a Trustee in Bankruptcy should a Receiving Order be made.

24. Provisions of Deeds of Arrangement:

At present Creditors are generally asked to give their assent to a Deed of Arrangement without ever being advised of its provisions, and even if many Creditors requested such information, the supply of Copies of the Deed would be a very costly procedure. It is therefore suggested that there be added to the Deed of Arrangement Act a model form of Deed (similar to Table A of the Companies Act which gives a model form of Articles of Association) and that every form of assent required to be signed by a Creditor should refer to this model form and state in summary any departures from, or alterations to the model which are desired in that particular case.

25. Estates of Persons Dying Insolvent:

In my view, Section 130 of the Bankruptcy Act should be amended so as to abolish the necessity for a petition to be served upon the legal personal representative of the deceased debtor. I am making this recommendation for two particular reasons:-

A. It frequently happens that executors appointed in a Will, or members of the deceased's family entitled to a grant of Letters of Administration who find that the estate is insolvent, never apply for a grant as they do not wish to assume the responsibilities occasioned thereby. It then becomes quite inordinately difficult for Creditors to have the estate dealt with by the Chancery Division of the High Court, and the delays caused by this are both frustrating and costly. Meanwhile, the valuable goodwill of a business may easily be destroyed owing to the absence of any person with authority to continue its management.

B. In cases where an executor appointed under a Will claims to be a Creditor of the Estate, he is in a position to exercise his right of retainer as soon as he has been granted Probate; and since the petition for an administration order cannot be filed until that time, the position of the other Creditors is seriously prejudiced, and it may be impossible to prevent the lawful exercise of the right of retainer by an executor whose moral right to it might be most questionable.

I hope that these observations will be of assistance to the Committee and I shall be pleased to supplement them by verbal evidence if the Committee so desires.

Yours faithfully,
(Sgd.) KENNETH CORK.

EXAMINATION OF WITNESSES

Mr. Kenneth Russell Cork, F.C.A.	}	of Messrs. W.H. Cork, Gully & Co.
Mr. Gerhard Adolf Weiss, B. Comm., A.C.A.		

Called and examined

212. Chairman: Mr. Kenneth Cork, I think you are a Fellow of the Institute of Chartered Accountants of England and Wales? - (Mr. Cork): Yes.
213. And a partner in Messrs. W.H. Cork, Gully & Co.? - Yes.
214. I think you have considerable experience as trustee in bankruptcy and under deeds of arrangement? - Yes.
215. Mr. Weiss, you are also a partner? - (Mr. Weiss): Yes.
216. Well, gentlemen, the volumes with which you have been supplied contain respectively our provisional amendments to the Bankruptcy Act and our provisional amendments to the Deeds of Arrangement Act. Of course, the amendments are all subject to what the witnesses may say, so I must ask you if you will be good enough to treat them as confidential. - Certainly. - (Mr. Cork): Yes, of course.
217. Mr. Cork, we have to thank you for a very interesting and comprehensive memorandum. I shall not trouble you to deal with any matters about which the Committee is in agreement with you. First of all, as regards the procedure relating to the bankrupt's discharge, broadly speaking there are two schemes under consideration. The main difference between them is that under the one scheme, if a caveat were entered, the Court would fix a hearing for the discharge application and if it refused to discharge the bankrupt he would then be under rigorous obligations as regards reporting to the Official Receiver, and so on. The other scheme, which we are inclined to adopt, is this - that if the Court enters a caveat the man immediately becomes subject to those obligations which I have mentioned, and has to apply for his discharge in the same manner as

the bankrupt has today. I do not know if you have any preference one way or the other? - Just so that I am sure I understand it - the second scheme means that the caveat would just bring into being the present situation, and then the Court would have the decision as to what it did with it? - (Chairman): In addition to bringing into operation the present discharge arrangements, it would place the caveated bankrupt under obligations as to reporting any change of name or address and lodging a report of his financial position every six months, from the moment of the caveat and not when his discharge was refused. - (Mr. Cork): I am in agreement with that. I personally feel that the sheep, if I may call them that, got dealt with severely before. I have no doubt there are many really quite harmless people who would never trouble anybody again; and yet they are dealt with in the same manner as the hardened bankrupts. We ought to make it easy for the sheep and more difficult for the goats. This scheme ought to have that effect.

218. I am rather in favour of the scheme in which the goat comes under the obligation to report himself from the moment the caveat is entered. This seems preferable to the scheme in which he has to wait till his discharge is refused? - I quite agree: from the date it is proved that he is a goat, that is, the date when the caveat is entered.

219. You suggest that where the bankrupt's two years are running out, three months before the end of the two years the bankrupt should be required to make a report about his financial position? - Yes.

220. We are proposing to enlarge Section 51 so that it covers remuneration or income of every description. An application could be made under that Section at any time during the two years. In view of that, do you think it is necessary to have this three months' report? - I think so, because I am afraid the bankrupts are going to slip through into their discharge without being investigated. You see, a man, when he has first gone bankrupt, can have nothing at all but, by the time the two years have run out, he might have built up considerable assets. Now the trustee may have completed his job and be out of office; the Official Receiver may or may not have time to look into it - I do not know how they work - and there may be no one to draw attention to those assets unless this is done.

221. Your other suggestion was that the trustee should have the chance, during the two year period, to apply for a caveat? - I personally think that is essential.

222. We were proposing to leave it open to the Official Receiver to apply during the two years. We felt that the entry or not of the caveat was largely a matter of conduct and therefore primarily up to the Official Receiver. The trustee could always report to him, of course. Do you think that would work? - I think the trustee ought to be separately entitled, because he is really the man who lives with the debtor's troubles. It is not just a question of conduct afterwards; something may have happened that proves that the debtor's conduct prior to his bankruptcy was very much worse than was originally thought. If the trustee merely reports to the Official Receiver, it seems to me that you are bringing too many people into it. After all, the Court decides whether the discharge is to be allowed, and it seems to me that if the trustee is responsible for running the estate he ought to have the right to apply for the caveat rather than just to report to someone else.

223. It comes to this - you think both those people ought to be entitled to apply? - Yes.

224. And no one else? I am sure you would agree we want to cut out vindictive creditors? - Yes. I think creditors certainly ought not to be allowed to apply.

225. They could apply at the conclusion of the public examination, but what we want to prevent their doing is coming back during the two-year period and making a subsequent application? - Yes, I am sure they should not be allowed to do so.

226. Then I think we have really dealt with your paragraph 1(C), because you share our view about it being preferably the caveated bankrupt and not the refused bankrupt who should be obliged to report? - Yes.
227. As regards your paragraph 1(B), we were proposing that the automatic discharge of existing bankrupts should apply only where the Court has not already pronounced on the bankrupt's discharge and should specifically not apply where the bankrupt has previously been adjudged bankrupt. - In that case it completely meets my views.
228. That brings us to your very interesting suggestion about second and subsequent bankruptcies. If I may say so, what you have suggested is extremely ingenious and has interested us very much indeed. But it is very complicated, is it not? - It is rather complicated, but it does seem very hard to me that the creditor who has created the asset - if we could think of a very simple case where there is only one asset and a man is a creditor for it - and that is taken off for someone else entirely. That has happened in my experience.
229. So far as that simple case is concerned, we are in principle agreed with you, but if I follow your suggestion aright what you envisage is firstly two, or possibly more, bankruptcies? - Yes.
230. Secondly, three sets of creditors, each with different rights? - Yes.
231. Namely, the old creditors; new creditors with notice; and new creditors without notice? - Yes.
232. And then you have three classes of assets, namely the original assets in the first bankruptcy, which probably will not exist after the second bankruptcy; second, after-acquired property in bankruptcy No. 1, which I think undoubtedly ought to vest in trustee No. 2; and thirdly, after-acquired property in bankruptcy No. 2? - After-acquired property ought to be shared. I would call a windfall.... - (Chairman): It might not be pure windfall: it might be something he had earned. - (Mr. Cork): It might be something he had earned, but I really had in mind a sudden legacy.
233. Quite so, but if he got a tip for looking after a motor car or carrying someone's bag to the station it could mean that? - It could, yes.
234. But supposing there is a third or fourth supervening bankruptcy, it would be very difficult? - It would be progressively more difficult certainly, but I think the third or fourth bankruptcy is unlikely. I have never found more than three.
235. I have known three come one after another. - Three is the limit I have known.
236. I think we all agree that your proposals, from the point of view of perfect justice, are quite admirable, but I do feel strongly that the drafting difficulties would be considerable. - Yes, I must say that when we came to compose that paragraph we ourselves found it a little difficult. But in one case I remember, the present rule occasioned such hardship that I feel it might be worth while, if it is possible, to draft such an amendment. The second after-acquired property is rather a refinement which might not necessarily be brought in. You could then merely have a date - everything after a certain date comes into the second bankruptcy - but of course it would not be so just then.
237. Not quite. But it would be a good deal simpler? - It would be a good deal simpler, yes. You could then have the date the bankrupt commenced the new business and any creditor after the first bankruptcy really comes in as a creditor in the second one. Then you would have no complications. That would be rough justice but probably better justice than you have at present.

238. Then I think your views substantially agree with our own. Your provision as to windfalls, of course, would create great difficulty? - Yes.
239. I see you do not think it necessary or desirable to increase the £50 limit for a petitioning creditor's debt. That has nothing to do with the value of money at all? - No.
240. And you do not think you ought to increase the limit of £300 for summary administration? - No.
241. I would agree with you that creditors should have complete discretion as to who they want as trustee, but surely, under the law as it stands at the moment, even in a summary case they may pass a resolution to appoint a non-official trustee? - They do not, in fact, do so. What I had in mind was that in most cases the estimated value of assets, which is made by the debtor, is notoriously inaccurate, both up and down. In many cases, the most usual ones, the estimate is found to be too high; the assets turn out to be grossly inflated.
242. It is actually the Official Receiver's estimate, of course, though he can only go on what he is told at that stage? - He goes on what he is told. We have had cases where there are no estimated assets at all and they have raised £15,000 and £20,000. The Official Receiver could not have known at that time that that was likely to happen. Taking the trustee's point of view, and my personal point of view, I would like the limit lifted, because no trustee can make any profit out of an estate of £300 worth of assets, however much he tried. That is from my personal view point and from a business point of view, not from a general principle.
243. Mr. Emerson: Would your view be affected if we proposed that any person should be able to act as trustee? - If in a summary case it were stipulated that any person can be appointed trustee, then I think so.
244. Would you agree to raise the limit? - I would agree, yes.
245. What figure would you have in mind? - I should think £500 - not a great deal up.
246. Chairman: Of course, that would not be commensurate with the fall in the value of money, but it would be a step towards reality? - I do not think that a difference between £300 and £500 really makes very much odds. I would not feel strongly about that.
247. We are in complete agreement with you about the limit for a bankrupt's tools of trade, wearing apparel and bedding - £20 is quite ridiculous. You say you think it should go to £100? - Yes.
248. We originally thought of £100. The Inspector-General considered £50 was enough, but even £100 would not go very far, would it, in the case of a man like a dentist who happened to have a large family and had a lot of expensive instruments? - My view is that it is no good having a provision that is not complied with. If you put it at £20, or if you put it at £50, it is not going to be complied with.
249. You mean that £100 is the least figure that is practicable? - I think so. After all, a decent suit of clothes costs the best part of £50 - that is the sort of level one has to consider.
250. We must bear in mind, of course, that it is not the replacement value that counts; it is what the Official Receiver could get for it if he sold it? - But these things are so expensive. I think it would be pointless to be mean on a thing like this.
251. Personally, I have always thought it is rather odd that if the bankrupt has clothes and tools and bedding to a value higher than the amount he is allowed to keep there is no machinery for deciding which the Official Receiver and the trustee is to take and which he is to be

left. Do you think there ought to be such machinery? - I do not think so because it is done by a reasonable compromise. Nowadays, in a deed of assignment, we usually put a higher figure. Yesterday we moved the whole of some furniture under a deed. I think really that, if some auctioneer got hold of all the little bits we left behind, they might well have been valued in excess of £100, although the auctioneer probably would not have got that. The valuation of these things is so vague that I think it is better left in the air rather than to have some machinery for deciding about it.

252. I think the next paragraph of your memorandum we are in complete agreement about, that, is that, the creditors shall have unlimited discretion as to the person whom they want to have as trustee. - It seems to me there is no reason why, if the creditors want the Official Receiver, they should not have him.

253. About the documentary transfer of surplus by the trustee to the bankrupt, we thought of providing that the trustee shall, within seven days after the day gazetted for the payment of the debts in full with interest, file with the Court a certificate setting out the amount of the proved and admitted liabilities, and the estimated value of the assets remaining, and state the date gazetted for the payment of the debts in full with interest, and that upon receipt of such certificate the Court shall forthwith draw up and file an order annulling the adjudication order, rescinding the receiving order and dismissing the petition. - That means the trustee is in control of the situation, since he determines the date on which he declares that particular dividend, and as soon as he declares his dividend he knows that immediately afterwards the surplus is going over to the debtor. That would meet my views.

254. We wondered whether the period of seven days might be too short. The Court would always extend it, I suppose, but perhaps fourteen days would give him more reasonable time, to make sure he had cleared up. - The trustee is constantly being pressed to get his dividend paid, and provided he could see himself clear he could probably declare his dividend to keep the creditors quiet. Seven days to tidy up the rest would be rather short.

255. Fourteen days would be sufficient, would it not? - Fourteen days would be adequate, I think, though after the trustee has finished, he has then to get a clearance from the Board of Trade, which might delay things.

256. It seems then that what we ought to do is to provide for a fairly substantial period in which to enable him to get his audit through, and then for a very short period in which to hand everything over to the bankrupt - say four weeks for one and one week for the other? - There is one thing about that audit, it should be simple because during the period to which it relates, the trustee will be mainly concerned with paying out dividends. The expenses incurred in realising the estate will all be passed by then so it should be a very simple audit at that stage.

257. In paragraph 8 you deal with prosecutions. I do not know if you would be in favour of preserving the right of members of the public to prosecute without having to get leave from anyone, or whether it ought to be only with the sanction of the Director that a member of the public can prosecute? - I think it ought to be with the sanction of the Director. You do get viciousness in bankruptcies, and I do not think such people ought to be let loose.

258. It seemed to me from evidence we had the other day there is even some danger of a really cunning bankrupt getting a friend to prosecute for some offence that he had committed, and thus arm himself with a complete defence against a prosecution by the Board of Trade or the Director when the evidence against him was complete. - It could happen. I think all prosecutions of this type are complicated and ought to be under control.

259. You think the sanction of the Director would be a suitable method of control, or do you think it ought to be the Board of Trade whose sanction should be required? - I do not think it matters, as long as it is some responsible authority.
260. Mr. Emerson: Would you agree that the Director or the Board of Trade should be allowed to exercise a veto on a person who wished to prosecute privately? - (Chairman): We had in mind the individual creditor who wanted to prosecute on his own responsibility. I do not know if the same would necessarily apply to the trustee. - (Mr. Cork): My remarks applied only to prosecutions by the creditor. I think that if the trustee wants to prosecute, he ought to be able to do so without sanction.
261. Chairman: I am not very clear from paragraph 9 what exactly it is you want done. If you require, by Act of Parliament, that in every deed there should be a committee of inspection or that in every deed the trustee should give some form of guarantee, you are interfering with freedom of contract to a very considerably extent, are you not? - There is already in the Deeds of Arrangement Act a provision that unless you get a resolution that there will not be a bond, you have to have one.
262. You can always dispense with the bond by passing a resolution? - It is invariably done. I was really trying to meet whatever worry someone else had. I am only too delighted not to have a bond; but if someone wanted control, then I think they should insist on a bond. Personally, I would not have thought it was necessary. With regard to the committee of inspection, in every deed my firm prepares, we have a specific provision in the deed that the trustee's remuneration will be passed by a committee of inspection. Otherwise the situation with regard to remuneration is unfair to everybody. I was looking today at the form of deed which we use in our office. This committee of inspection appears out of the blue; it is not referred to in any part of the deed, until it suddenly says that the trustee's remuneration will be passed by the committee of inspection. The only specific authority the committee appear to have is to pass the trustee's remuneration. In point of fact we treat them - and I think everybody else does too - as if they had the powers of a committee in bankruptcy or liquidation.
263. We are in agreement with you on your paragraph 10A, but, strictly speaking, Rules are outside our purview. We are only bound to consider changes in the Act. I do not know if you would like to say, by way of elaboration, anything else regarding 10A? - I think the most difficult situation that a trustee is called upon to face is when he is appointed by a vote that does not express the wish of the creditors; and you get the largest creditor - perhaps ruled out of order on some small technicality - who is constantly hostile thereafter throughout the whole proceedings because his own trustee was not appointed. He feels very hurt by it, and it is basically unfair.
264. In 10B you deal with another practical difficulty - the trustee now has to part with all the proofs to the Official Receiver within 28 days for the purposes of examination. Would it meet your point if what he was required to pass on would be a copy of the proofs? - No. I think the 28 days is quite inadequate to investigate a bankruptcy and to decide whether a proof is good, bad, or indifferent. I know you can stand it over and do various things; but I do not see the necessity of tying the trustee down to a date. He has to agree to them before he can declare a dividend, and that is the crucial point.
265. You would like to see the time limit abolished altogether, or would you like to see it extended? - I think it should be abolished. I think it is pointless.
266. You think he has enough incentive to get on with the job, because he cannot declare a dividend before he has agreed the proofs, and the creditors will be getting clamorous? - Yes, because creditors exercise a fair pressure to have their claims accepted, and a date that is not complied with is pointless.

267. What you really would like is to be in the same position as regards proofs and dividends as the Official Receiver is? - Yes. There is one very strong point in favour of what I am saying. Supposing there are no assets - or very few assets - and supposing you have a number of claims which are very complicated, and which might be bad. Now, if there is not going to be a dividend, there is absolutely no point in fighting them to the bitter end. If there is going to be a big dividend then it is absolutely essential that they should be fought out to the bitter end, and I think the trustee should wait and see what is the likely outcome; otherwise you are wasting money in the bankruptcy.
268. We have substantially done what you want, I think, as regards your first suggestion under 11, as regards proxies. - At the present moment I do not think anyone worries whether proxies are typewritten or hand-written.
269. As regards the second one, what we are at present proposing is that the creditor could give a general proxy to a person not in his permanent employ, for example, his solicitor or his accountant, but that a general proxy so appointed shall not be able to serve on the committee of inspection. Do you think that is a good idea, or not? - I cannot personally understand why everybody is worried about what the general proxies do at meetings. You can go to a meeting with a proxy and you can make yourself a director and buy up the assets. You can do anything in a company, but in bankruptcy you give a man a general proxy and then you put restrictions on him. We ought to be trying to get the ordinary creditor's wishes reflected in what happens. The ordinary creditor has no idea of the difference between the general and the special proxy. If he gives a man a general proxy he thinks that man can do what he likes. If he is going to vote for himself he ought to tell everybody present what he is doing, but I cannot see why he should not in fact vote for himself. We get general proxies sent to us to go to meetings of creditors, and those people mean us to have them, and to be appointed trustee if we think it right. Such proxies cannot be used at all in some cases. Is it fair to the creditor that his wishes should be discounted? You were suggesting that the general proxy should not go on the committee of inspection. I think it is an excellent idea in one way because you get the creditors on the committee and they are the only people who ought to be on it. But if the creditor wants somebody else to go on, I cannot see why he should not be allowed to appoint him. I always think that the member of the committee ought to be somebody appointed by the creditor. It does not matter whether he is an employee or not, or if he is the man who goes to the meeting. I do not think that members of the committee ought to be appointed at the original meeting by name. They ought to be a representative of such and such a creditor, and then he can nominate whom he likes. Then the question of whether he is a general proxy or not would not come into it.
270. I do not know what you think about this - if the general proxy were not allowed to serve unless he was appointed, not only to be my general proxy, but also to be my representative on the committee of inspection? - I am sorry; I did not make myself clear. I do not think there should be any question of the man who actually attends the meeting - whether he holds a proxy or not - being appointed. For instance, suppose he is representing Snooks & Co. Ltd., then the man I would put on the committee would be a representative of Snooks & Co. Ltd., and it ought to be nothing to do with it who actually turns up at the meeting, or whether he holds a proxy or not. Then Snooks & Co. would report to the Official Receiver the name of their representative.
271. Would you be in favour of Snooks & Co. nominating to serve on the committee of inspection Mr. A. for its first meeting, Mr. B. for its second meeting, and so on? - No, it must be one man.
272. Mr. Sherwell: Not necessarily an employee of Snooks & Co. but anybody? - Anybody they like. It really is up to them, although it is better to have one of their own representatives.

273. Chairman: So you would be in favour of not making a regulation forbidding anybody not in the employ of Snooks & Co. to be nominated? You would leave it to Snooks & Co. as to whether they would have their own employee, or some more or less outside person, such as their solicitor or their accountant? - Yes. There is a very good reason for that. The company may be in Gloucester, say, and the trustee may be in London; and the thing you want most of all is for someone to attend the meetings of the committee. If you insist on one of your permanent employees, the chances are poor, after the first meeting or so, of his attending at all, especially if it looks as though there will be no dividend paid to the unsecured creditors. So it is better to have someone in London. But I must say the best person would be a real representative of the creditor, that is one of his own employees.
274. Taking the case of a company, Snooks & Co. Ltd., there, I think, is an illustration. Do you think the same thing should apply in the case of an individual or firm? - Yes, indeed. In this connection I think I also say somewhere that the people who have the power to appoint the member should also have the power to change him. The member may leave their employ, and it is very difficult after they have left their employ. It does cause trouble. You have a man who may have left a firm and might be unpopular with them; he either does not turn up at the meeting or he comes and makes violent complaints about the firm he previously worked for.
275. Have you in mind any special machinery for removing the creditor's particular nominee and putting someone in his place. It would be just a formal notice to the trustee, I suppose? - I think he ought to send a letter to the trustee and to the Board of Trade.
276. Mr. Emerson: But if he is a nominee of the creditor, why should he send a letter to the Board of Trade? - The Board of Trade always check up as to who attend the meetings of the committee when they do an audit, and it would be more convenient for them if they knew when a new man was there. - (Chairman): If all the people who are representing each creditor each changed their name, the Board of Trade, on audit, might find the committee entirely composed of new people. - (Mr. Cork): So I think a note to the Board of Trade would save the trustee having to notify them.
277. Chairman: I see you say that you want the provision about the premium on a trustee's bond being chargeable against the estate only upon the authority of the creditors or the committee of inspection to be abolished. Would you put anything in its place, or leave it out entirely? - Leave it out. At the present moment, if anybody thinks of it, there is an automatic resolution; but there are the rare occasions when this is overlooked and the trustee has to pay for a bond. As it is the general practice, it seems only just that the estate should pay for the bond. It seems pointless to have a resolution.
278. It is so obvious that it is likely to be forgotten? - Yes. The only possible objection is that, if the trustee is of doubtful ability and the company charges an excess, then it is rather unfair to charge the creditors with it. I suppose that if there were an excess he would not get a bond at all.
279. I see you are suggesting that a resolution made by a committee of inspection should be valid if it is passed either by the meeting or is agreed to in writing by all the members of the committee. Do you think that would improve things in practice? - Yes, it would improve things a very great deal. We are constantly having this trouble over some simple thing for which we have to get the resolution of the committee. The committee are scattered all over England, and you call them together and they do not turn up, and you have no quorum. Not only is it a waste of time, but it stops them coming to other meetings because they are irritated. If they all agree it seems pointless not to call that the wish of the meeting.

280. If they all agree in writing that something should be done, it does not serve any good purpose to bring them into one room to say the same thing, as a formality? - No. Very often you have something you want agreed quickly, because there is urgency about it, for instance, the sale of a business. You can ring round to the committee in an hour, get all their consents, and then you can say to the purchaser, "It's a deal", whereas if you have to call a meeting in a week's time, by the time it is all over, you may have lost the chance of that sale.

281. Do you want to say anything more about the suggestion you have made that there should not be a provision that the committee should meet once a month? - I have never known of a case of a resolution such as I have mentioned not being passed. Therefore we might just as well make the Law comply with what happens. If you want to make them attend every meeting, let them meet three monthly but not once a month.

282. It is far too frequent? - Yes. If you tire them, they will not come at all.

283. Strictly, your suggestion in paragraph 13D about Rule 367 being amended is outside our province, but I think what you are really getting at is that the committee get very fed up if they have to take an audit too often? - Yes.

284. There again, if you tire them they will not come? - They will not come at all. It is the biggest problem in bankruptcy, getting your committee to come to meetings.

285. I do not know if you want to say any more about 13E? Your proposal to remunerate members of the committee of inspection is very revolutionary, to say the least of it? - The main thing you want on the committee is creditors. I think there is a feeling that, by not permitting any remuneration, you get creditors rather than accountants and lawyers sitting on the committee. It is quite the opposite. Because of the difficulties and the waste of time and expense the creditors park this job on their accountants and lawyers who happen to be in the town where the meeting is likely to be held. Committee members get their expenses refunded, it is true, but if there was an allowance of two guineas I think it would encourage them to attend. I cannot believe it will make any difference to the costs of the estate. I am not sure, however, that two guineas is not too much; I would say that it should not be more than two guineas. If the creditor comes up to the meeting at the present moment the trustee is in great difficulty; you cannot pay him his expenses straight away, you have to apply to the Board of Trade and get it passed. The creditor is doing this not only for himself and his own debt. He says - "If I am a witness in Court I get something for going there". I cannot understand why we should expect a man conscientiously to come up and do his best when we do not make the slightest effort to compensate him for the time involved in doing it. I quite agree you cannot pay him an amount commensurate with his earning capacity, but I cannot see why he cannot have his out-of-pocket expenses and a guinea, or out-of-pocket expenses and two guineas, for this job he is doing for other people. Again, I think it would help you to get them there. It is much better to have them there than not to have them there.

286. Mr. Bear: Do you think they would really come for a guinea less income tax and surtax? - I am not the keeper of the conscience of the man who receives the two guineas, but I think he would come for the two guineas or the guinea because most people forget that they have to pay tax on their earnings and do not look at the net amount but at the gross amount.

287. Mr. Lloyd Williams: Surely you can pay them their out-of-pocket expenses? - I can pay their out-of-pocket expenses, but take the man who comes from Gloucester to London. It is a whole day's job. He may be an employee of the creditor, he may be a little creditor on his own who keeps a shop or something. He comes all the way up to London,

he has a half-hour meeting, and he has to go all the way back. He gets his out-of-pocket expenses paid, but he does not even get 5/0d. to buy a book to read on the train. It is not sensible. You are trying to make a man do something, and the moment he finds he is not going to get what he calls his "witness fee" he is very much upset. I dare say Mr. Emerson has found this?

288. Mr. Emerson: I have not personally, but I am against remunerating the committee of inspection. That is only my own personal view. - I think there should not be payment of any size that can be looked on as remuneration.

289. Chairman: What you pay would be a solatium? - (Mr. Emerson): It would be a carrot. - (Mr. Cork): It is paid as a carrot, but it should be large enough so that they would want to come to the meeting. I would like to add one other point. At present nobody knows whether lunch and tea is an expense that ought to be paid for or not, but at least he could come up and give himself a jolly good lunch and go back again, and not have to pay for it out of his own pocket.

290. Chairman: He has to get his lunch anyhow if he is going to subsist? - Yes, but there is a lot of difference between going home to lunch, or having it in a small restaurant, and coming up to London.

291. Mr. Emerson: One objection I see is that the majority do not come a very long distance, and if a fee is to be authorised under the Act, a creditor who comes from next door will expect the same fee as the one who comes from Gloucester, just because it is authorised in the Act. - Yes, but even if a man does merely come across London, provided the remuneration is so low as not to make it an inducement to have too many meetings, isn't it desirable that such a man should give up his time and come to help us to deal with the affairs? Does it matter if he gets a guinea? It must be worth that to have him there.

292. Chairman: Would you be in favour of a remuneration graduated in some way proportionately to the distance travelled by the member, or the time he was away from his business? - I think that is a good idea, but probably the complication would not be worth while. I think probably the right fee is one guinea. It is not enough to make an adequate fee for an accountant, but it is enough to encourage the creditor to come.

293. It is a novel idea, Mr. Cork; we will think it over. - I know everybody is against it, but I cannot see why a witness should get a fee if a creditor does not. The committee member is using his brain, but a witness is just repeating what he knows.

294. The latter part of what you say in paragraph 13E relates to a practice which, I think I am right in saying, is not enjoined in any way by the Act or the Rules. I do not quite see how we are to abolish a practice? This practice causes a lot of dissatisfaction with committees. That is why I brought it up. If their return fare is 25/6d. I think you ought to give them their 25/6d. and get a voucher for it, but now you have to apply and get it agreed, and then pay it.

295. Mr. Lloyd Williams: Is there anything in the Act or the Rules which compels you to do so? - It is in the instructions to the trustee.

296. It is not in the Act or the Rules? - No, I do not think it is. But all these things upset committees.

297. Chairman: Paragraph 14 of your memorandum is really a matter for the Rules. What I understand you to have in mind is that the trustee should not be required to put his hand in his own pocket; it should be sufficient if he gives an undertaking? - Yes, if he gives an undertaking to discharge these amounts out of the first assets which come into his hands.

298. As regards the powers of a trustee, we thought of cutting out sub-section (2) of Section 83 altogether, and of substituting for the requirement of a prior sanction for the employment of certain persons a provision that the Taxing Master shall satisfy himself of the sanction either before the employment or within three months thereafter. I wonder if you think that is still too stringent, or whether you think that would meet the case? - That is perfectly all right.
299. Have you anything more to say about your suggestion that the trustee should be entitled to pay costs not exceeding £10 without taxation? - Yes, we have a lot of trouble like this. You get a solicitor who has done 35/0d. worth of work, and you ask him to tax it; he says he will not be bothered, and in the end he does it for nothing. It is very good for the estate!
300. Not very good for the solicitor? - No, not very good for the solicitor. It does seem to me in the control of trustees the hundred pounds are more important than the five pounds and the time involved in taxing the small amounts. It is to everybody's advantage to cut that out, and let the major issues be controlled. I imagine there is a lot of wasted time in the Courts too, taxing little tiny amounts.
301. Mr. Emerson: There is one question I would like to ask on Section 82(1). There is a proposed alteration there in the new Section 82(1) - "of which one part shall be payable on the amount realised by the trustee or brought to credit by the trustee and reasonably required for the purpose of the bankruptcy". Do you think the words "... and reasonably required for the purpose of the bankruptcy" are too wide? - Does that mean assets coming from the Official Receiver?
302. It means all the assets, but it also means, as I see it, that it is the Board of Trade who will decide what are the assets "reasonably required". - (Chairman): It is easier to define it by saying what it does not mean. It means he does not get remuneration by way of percentage on any surplus that there may be after payment of the debts. - (Mr. Emerson): That is the point I am trying to make, because he may have to realise a surplus. He may sell a business as a going concern and have to make a surplus. - (Mr. Cork): It seems a most illogical thing to me, because if the trustee does his job really well - let us assume he fights some sort of legal action and wins it, a very difficult one, and as a result of that he not only pays all his creditors in full but he hands a very large sum back to the bankrupt - supposing without that he would have paid 18/0d. in the pound, yet he felt that was his duty, because there were those assets there - why should not he be remunerated exactly as if he were acting for the benefit of the creditors? I think you are being unkind to the debtor. The trustee might stop and say - "I am finished altogether now".
303. Chairman: Would this be an illustrative case? Supposing he recovers a judgment which, if fully executed and enforced, will leave the bankrupt a surplus. He puts the sheriff in and sells some furniture or something until he has got enough to pay the creditors and his own costs. He then calls his dog off and says - "I will not go on any more; if I do the proceeds will only go to the bankrupt and I shall not get a percentage on it". - I do not think he will look at it so commercially as that, but you will create the atmosphere that he ought not to realise more than enough to pay the creditors.
304. He ought to realise all he can? - He ought to realise all he can for everybody's benefit. I think it is wrong to get the impression that the trustee is only representing the creditors. He is acting for the bankrupt and, once he is in the clear, it is his duty to realise the assets for the bankrupt. It is rather like in a liquidation where he realises for the shareholders as well as the creditors.
305. Putting the other side of the picture, supposing that the debtor has, say, a large block of shares and the trustee, by selling half of them, is able to pay everybody, including himself, in full. Is it your view that he ought to go on and sell the whole lot of the shares,

irrespective of the wishes of the bankrupt, in order to hand money to the bankrupt? - No, that is not my view. You are taking a case which is extremely unlikely to happen. If all these easy assets were there to realise the man would never have been made bankrupt. As a check on excessive remuneration being paid to the trustee, there ought to be some provisions, and there are in fact, for people to object to his remuneration. Surely the people who are assessing what he has done are assessing a percentage of the things he does, and they ought not to give him a very high percentage on a lot of things he has done unnecessarily. It really is a case for the Board of Trade to turn round and say - "This is idiotic; you ought never to have done that; you cannot have 5 per cent for doing it". That really is the position, but it is very unlikely to happen. The last estates to pay 20/00, are the very difficult ones.

306. Do you want to say any more about your proposal empowering the Board of Trade to fix remuneration where there is no committee of inspection? - No, I think it speaks for itself.

307. As regards your suggestion concerning the passport of the bankrupt, do you think it would meet the case if we introduced at some appropriate point a new subsection expressly empowering the Court to impound the bankrupt's passport, and a provision that that new subsection should bind the Crown? - Yes, as long as the trustee will be able to apply.

308. You agree I suppose that it is essential that if we do introduce that subsection we must make it clear that that subsection binds the Crown? The present view of the law is that the passport belongs to the Crown. - I had not appreciated that point. Yes, it must bind the Crown. We have had a great deal of trouble about bankrupts getting out of the country. You do not know where you are. If they are British subjects and they come back you do not know; nobody can tell you when they cross our frontiers, because they are British subjects. So they can come back and live in England for six months, and you do not know they are there. When you get after them they have gone abroad again. If it is a foreigner it is different. You can pick up a foreigner or get information about his movements, but you cannot do so with a British subject. He passes without anybody bothering; there is no record made.

309. And in this day and age he passes extremely quickly and extremely easily? - Very.

310. You think the power of the Court to impound his passport is sufficient to deal with the evil, do you? - I think that is enough. I imagine once it is impounded it is impossible to get another one, unless by deliberate fraud.

311. I see you want only one advertisement of notice of intention to declare a dividend. That is really a matter of Rule again? - Yes, it is.

312. I see you say that the provision whereby a creditor is required to give an indemnity against losses where he asks for a special manager to be appointed should be abolished but, with great respect, I do not think it can, because I do not think there is any such provision to abolish. - All I know is that you cannot get one appointed unless you get the creditor to give that undertaking.

313. I think it is a mere matter of practice that the Official Receiver frequently does require an undertaking in this sense by a creditor who asks him to appoint a special manager. I do not see how we could interfere with what is a mere matter of practice. We might, of course, put in some recommendation about it in the body of our report; we cannot put it in a draft Act. - Unless you put a provision that it would not be required.

314. That would create a very awkward situation in some cases. In some cases it may be only reasonable that the Official Receiver should require the undertaking. - The Official Receiver is in a very difficult

position at the moment, and this is in no way in criticism of him. He would be responsible, I suppose, if the special manager is appointed and made a loss. But in point of fact, in most cases where a special manager is appointed, it is a good thing to have him carry on that business even if a loss is made, because you maintain the goodwill and sell the business as a going concern. This is the main disadvantage of a bankruptcy as against a deed. With a deed you can carry on the business without any trouble, whereas in bankruptcy it is only with trouble. If you stopped this happening, bankruptcy might be more popular with creditors.

315. I wonder if you think this would meet the case, to put in an express provision that the refusal of the Official Receiver to appoint a special manager, or his refusal to appoint a special manager unless conditions are complied with, shall be subject to appeal to the Court? Then, if the Official Receiver says - "I will appoint a special manager provided you undertake to indemnify me and him against losses" - the creditor could then go to the Court and try to get the Court to say that was unreasonable. (Mr. Emerson): The matter is usually one of urgency where the appointment of a special manager is wanted. - (Chairman): Do you think that would cover it? - (Mr. Cork): No, I do not. It is a matter of great urgency, and I think that because of this difficulty, there are many cases that are dealt with under deeds of assignment, when, from the conduct of the people concerned, they ought to be dealt with in bankruptcy.

316. Another possible way of meeting the case might be to provide that if the creditor gives an undertaking to pay losses, and subsequent assets come to light, either the undertaking shall not be enforced or, if it has been enforced, he shall be indemnified out of those assets. I do not know what you think about this? - You are really saying he gives an undertaking, providing there are not adequate assets, to cover the loss.

317. Providing adequate assets do not later turn up. There may be no assets at the moment to carry the losses, but as investigation proceeds assets might come to light. - He ought in that case, I think, to be indemnified.

318. Mr. Emerson: There must be some assets shown, otherwise he would not require a special manager. Would it cover it if we were to amend Section 10(1) to say - "the Official Receiver shall". If we alter "may" to "shall" would not that force the issue, as there would then be a complete directive to the Official Receiver, without the chance for him to ask for this advance security? - If he is satisfied he would have to appoint. He cannot then say to the creditor that he will only appoint a special manager if he will give him an indemnity, so it would cover the point.

319. Chairman: I think we can consider that as a possible way of meeting the difficulty - I am sure this is a terribly important point that would stop unsuitable deeds of arrangement.

320. Your suggestion of £2,000 being permissible as a retainer in the hands of the trustee - It is too much. I have thought about it since, and I am afraid it is much too much.

321. What sort of figure would you suggest, in view of the present day value of money? - £500 I think. I am sorry the £2,000 went through. I think I was applying it to specific ideas in my mind and not to the general one. There is one point that links up with this. When you apply for a banking account the cheques also have to be signed by a member of the committee of inspection. That is a great difficulty. We are running a business now with two trustees and a member of the committee. Every cheque has to be sent across London twice, and a lot of cheques are urgent. It does seem pointless if you cannot trust a trustee, with an audit on top of it, to sign a cheque just because he is running a business. - (Mr. Emerson): And he has given a guarantee bond. - (Mr. Cork): And he has given a guarantee bond. The committee member will sign all the cheques in advance and leave them with you, so it does not do any good.

322. Chairman: It is quite a nonsensical proceeding? - It is quite a nonsensical proceeding.
323. As regards paragraph 21, we have abolished the landlord's right of distraint after the receiving order. - That covers my point then.
324. Your other suggestion has puzzled me a little bit. You suggest that the liability of a trustee for failure to disclaim should be limited to the assets in his hands, but the assets in his hands at what date? - I suppose at the time the liability arises. Then his liability would be limited to the assets that have come into his hands at any time.
325. They may have been distributed long before the liability comes to light? - Even then I still think that if he has paid away assets without ascertaining his liability, all right, let him be liable for the total amount that he could at any time have had. This has happened to me, and it was a very sad story. I think it would help to give an example of what happens. I was called upon by a lawyer to disclaim a lease. I got my committee's sanction to disclaim it, notified my solicitors and instructed them to disclaim it, and they disclaimed it one day late. The landlords refused to accept it. The bankrupt, just before he went bankrupt, had taken a lease, worth about £250 a year, for £1,000. It was in about 1947 when rents were very high, and I was left with a liability for about 25 years of £1,000 a year, and I had very great difficulty in getting out of it. When I found someone to take the lease on, which was a miracle, the landlord said - "We prefer you as tenant rather than the people you have found". In fact my insurance company paid up and then claimed off the solicitors on the ground of their negligence to the trustee, but I do not think it is fair that the trustee should be put into that position.
326. That is a very sad tale. But I think myself there is considerable practical difficulty about the suggestion as framed. Surely the answer is that the trustee can protect himself by insurance, is it not? - There can be a very big sum of money involved.
327. Mr. Emerson: There is a suggestion in one of the memoranda that the property of the bankrupt burdened with onerous covenants should not automatically become vested in the trustee. I do not know what you think about that? - That puts the same problem in another way. At the moment, without the trustee doing anything, all this falls on him. - (Chairman): Yes, of course that is so as regards property in existence at the time of the adjudication. We are proposing, I might tell you, and I think you will probably agree, to try legislatively to repeal Re Pascoe, so the trouble should not arise in the case where he has after acquired a piece of onerous property. - (Mr. Cork): I know a trustee should be wide awake, but if he is running a business with a lease on that business, trying to sell it, and the twelve months has gone by, it is his personal lease. It is very easy for twelve months to pass by. When notice has been served on him then I think he is at his peril, and in my case I think it was fair game. The twelve months is the difficulty. It is his personal lease, and it does seem to be most unfair and unjustified.
328. Chairman: I do not know if you would like to say any more about the latter part of your suggestion under paragraph 22, which is about assimilating the procedure on a winding-up petition with the hearing of a bankruptcy petition in a case where the debtor and creditors oppose on the grounds of the creditors' general interest? - What we felt was that, first of all it was essential that the Registrar should have a power to do what was in the interests of everybody, and we felt he could not exercise that power unless similar publicity was given to the bankruptcy proceedings as is given to companies. All we are trying to do is to make the information available to the interested people.
329. I do not myself quite follow why you say that your suggested procedure will give all creditors, whether or not they have been disclosed by the debtor, an opportunity to appear. Is it merely because they may hear of the proceedings and can come along, even if the debtor

has concealed his debt to them. - Yes. Bankruptcy at the moment is rather a private, quiet affair.

330. Very much so, until a certain stage is reached. Your suggested procedure in the events contemplated is modeled on the petition for winding-up companies, is it not? - Mainly, yes.

331. Is there anything more you want to say about it? We have all read your memorandum on the subject. - I think that clearly gives our views.

332. We were proposing that the time for presenting a bankruptcy petition founded on a deed of arrangement as an act of bankruptcy should be cut down in all cases to one month. I think that would largely meet the points you make in paragraph 23, would it not? - Yes, it would do so largely. But I still have many cases, where a deed is signed and there is an offer for sale of the business, and it is in everybody's interest for it to be sold immediately. If the creditors are the same creditors, and if the committee members are going to be the same as in any bankruptcy, it seems to me that the trustee ought to be able to give a good title and to be able to hold that money, even if it is only for a month.

333. We shall have to consider then whether the trustee under a deed has adequate power to dispose of assets quickly and give a good title to them? - Yes. He clearly has not at the moment.

334. He has not at the moment, or is it that you think he has not? - I have been advised I have not. In point of fact you very often do sell, because it is everybody's interest, and one has the uncomfortable feeling that the sale might be challenged at a later date. In my case it never has been fortunately, but it might be, and the purchaser will not always accept your title either.

335. Mr. Emerson: But there is much greater protection for a trustee under a deed if there is to be a provision whereby the Court can say a receiving order is not in the interest of the general body of creditors? - Yes, but I gather from reading that Section, as against what we are asking for, that it applies only if the particular creditor asking for the winding-up is doing it to get some advantage.

336. Chairman: Not only that quite. It is open under that Section as drafted for the debtor to say to the Court that it is not in the interest of the general body of creditors that the receiving order should be made, and the Court has discretion to consider whether it will make a receiving order, even though the formalities of the petition have all been complied with. - That is in fact exactly what we are asking for.

337. Where you go further than we do is that your procedure will give an opportunity for all the creditors, disclosed and undisclosed, to come forward and state their views. That, of course, is a very important difference? - Yes, I am happy with that, but I think we ought to give the other people the opportunity.

338. It rather revolutionises what has always been the principle of the proceedings on the bankruptcy petition? - Yes, I think that is because we look at a deed of assignment rather like a voluntary liquidation as against a compulsory. On this particular subject there is one point about trustees under deeds that fits in with this. I think the trustee under a deed of assignment, if the conduct of the debtor is either very bad, or if matters come to light which show that things have happened which, if dealt with in bankruptcy, would be serious matters, should himself be able to apply to the Court to have the estate dealt with in bankruptcy. The reason for this is that, once everybody has assented to the deed, you cannot make the man bankrupt; there is no one there to do it. Cases do happen where everybody, bona fide, accepts the deed of assignment from the debtor and as soon as he has got that deed of assignment assented to either it transpires that he has been doing very wicked things that no one knew anything about, or he starts behaving incredibly

badly, and there is nothing you can do about it. It seems to me the trustee ought to be able to go to the Court and say this ought not to be dealt with under a deed, it is a matter that ought to be dealt with in bankruptcy, and that then the Court ought to consider the matter and decide whether they agree with him or not.

339. Mr. Emerson: Subject to the protection of the trustee for his past actions? - Yes.

340. Chairman: Have you in mind any particular stage in the proceedings at which the trustee should make his application - within such-and-such time after execution of the deed, or anything of that sort? - No, I think at such time as he becomes aware of facts which make it clear that the estate ought to be dealt with in bankruptcy. There is one further point. If, at the present moment, a deed of assignment goes into bankruptcy, the trustee is almost looked upon as a kind of guilty party, a trespasser, and therefore his position ought to be protected.

341. To a greater extent than it is? - To a greater extent than it is. I see no reason why the trustee under a deed should not be the trustee in bankruptcy. It is said that he is the accounting party and he cannot account to himself, but it is the same body of creditors, they want the same fellow, and it is only really a continuation of what has already been going on. I do not see why there should be that variation of procedure because the deed has become void.

342. Your other suggestion about deeds of arrangement is that there should be a sort of model deed forming part of the Act, and creditors should be notified of deviations from it? - Yes.

343. Would you like to say anything more about that? - I do think that, at present, creditors sign a document and they have not any idea what it is; they never see the deed. The assents come in; you cannot circulate the deed; they do not know what they sign; and in some cases I imagine they may have assented to very peculiar deeds.

344. Could they call at the trustee's office and inspect the deed before they accept it? - It would be a great complication if they did, and in fact they never do. If you have a model deed everybody knows what is in it, and their solicitors could tell them what is in it, and any variations should be notified to them. This is really more for the protection of creditors than it is for the trustee.

345. There are only three other matters of general importance I want to bother you about. The first one is this; do you think in this day and age there is any value in the doctrine of reputed ownership, or justification for keeping it? - No, I do not think so. I do not think it could ever apply now. It is the custom in every trade to have goods that do not belong to you. I have never known it working.

346. We were proposing to try to solve the Gordian knot of distress and execution by making the seizure in execution the act of bankruptcy, and not the expiry of the 21 days, but providing that if the sheriff or bailiff, as the case may be, can hold the thing seized for 21 days without notice of bankruptcy petition, the executing or distraining creditor can retain the proceeds, but if he gets notice within 21 days, then he has got to cough up. - I think that would make it very much clearer than it is at the moment.

347. Do you see any objection from a practical point of view? - None at all.

348. Rather similarly, as regards preference we were considering whether it would be practicable for there to be an absolute period of 21 days before a particular date, probably the date of the receiving order, during which it should not be necessary to prove a dominant intent and, except for such things as payment of cash for the debtor's daily bread and the like, any payment within that period could be avoided by the

trustee. We will probably have to go further and protect payment in the ordinary course of business into his banking account. - I think that would be a very good idea, because the intention to prefer is a very difficult thing to prove. I wonder, however, if 21 days is going back long enough.

349. It happens to coincide with the proposed period in regard to executions; we thought there was a certain logicality in that. - Yes, I think it is in those last three weeks that the bulk of the damage is done. I do not think I have known a case that has gone outside three weeks, or hardly ever.

350. Thank you very much, Mr. Cork, for your most helpful evidence. We are sorry to have kept you so late.

(The witnesses withdrew)

Monday, 23rd April, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. N.B. SHERWELL, O.B.E.	
MR. B.B.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

MEMORANDUM SUBMITTED BY MR. TORQUIL JOHN MURDOCH MACLEOD, C.A.BANKRUPTCY LAW AMENDMENTA. DischargeSuggested Amendments to Proposed Scheme

1. (a) The Official Receiver, Trustee or any Creditor to have power to apply to the Court to enter a caveat at the conclusion of the Public Examination or at any time during the period of Suspension if the Debtor's conduct subsequent to the Bankruptcy has not been satisfactory or if facts not disclosed at the Public Examination should come to light which if known at the time would cause a caveat to be entered.

(b) No comment.

(c) This clause to apply to all bankrupts whether granted a discharge under Clause (a) or not until discharge becomes effective.

(d) No comment.

(e) Automatic discharge of all existing undischarged bankrupts subject to following additional conditions:

1. Discharge not to be effective until expiration of two years from the conclusion of the Public Examination or as provided for in (d).

2. Application to be made to Official Receiver or Trustee and bankrupt to give information as to financial position and transactions since Receiving Order, present occupation and income, and future prospects, possible interests in wills, etc.

3. Discharge not to be automatic in non-surrender cases or where Public Examination has not been concluded or dispensed with.

4. Before discharge becomes effective Trustee to file on Court File a certificate that the bankrupt's conduct during the Bankruptcy has been satisfactory.

B. Comments on Further Matters

2. Assets acquired after bankruptcy and not attached by the Trustee in that bankruptcy should be available for the creditors in the subsequent bankruptcy.

Creditors in a bankruptcy not to participate in the assets of a subsequent bankruptcy until the claims of the creditors in the subsequent bankruptcy have been paid in full.

3. Petitioning Creditors debt could be increased to £100 or £150 from £50 although this would not appear to be necessary as few creditors would nowadays incur the costs of a petition for a debt of £50.

Increase in the estimated amount of assets to enable a summary order to be made would not appear to be necessary or desirable, as it would lead to more cases being left with the Official Receivers whose staffs are already fully occupied whereas there are non-official Trustees available for dealing with such cases.

4. The Trustees title should not be so limited. The bankrupt can at present deal with his after-acquired property until intervention by the Trustee (but see re Pascoe 1944).

5. Yes by Special Resolution of the Creditors.

6. Yes, this would dispose of the uncertainty of the Trustees position in making payments to the Debtor from a surplus or of re-vesting any unrealised assets in the Debtor until an order annulling the Bankruptcy has been made.

7. Yes, wages, salaries and income of all kinds.

In cases of persons with irregular income, such as actors or self-employed persons, provision could be made for any amount ordered to be paid to the Trustee during a period of employment to be retained for a period to be fixed by the Court making the order during which the Debtor can apply for the refund of such part of the amount paid as the Court may decide upon being satisfied that it is necessary for the maintenance of the Debtor and his family.

8. Yes. Prosecutions would probably be conducted more satisfactorily and expeditiously by the Board of Trade than by the D.P.P.

9. Trustees accounts to be audited by Board of Trade as in Bankruptcy.

No property to be sold except by Public Auction without the consent of the Board of Trade or the Committee of inspection if any.

C. Further Suggestions

Sec.1. A Deed of Arrangement when accepted by the requisite majority of Creditors should not be available as an act of bankruptcy and capable of being set aside by any subsequent bankruptcy.

Sec.20. (4) If a majority of the Committee is not present at a properly convened meeting the Trustee may act on an authority in writing signed by all Members of the Committee of Inspection.

Sec.20. (8 & 9) If it has not been possible to fill a vacancy on the Committee of Inspection at a properly convened General Meeting of Creditors the Committee shall consist of the remaining Members provided there be not less than two Members.

Sec.22. In addition to the duties imposed by this section the bankrupt shall at the end of each 6 months from the date of the Receiving Order account to the Trustee for all his financial transactions during the period. The Debtor shall at all times inform the Trustee of changes of address.

Sec.33. (1a) Preferential claims for taxes to be restricted to the year ended 5th April preceding the date of the Receiving Order and for Excess Profits Tax for a chargeable accounting period ending during the year prior to the date of the Receiving Order and not to exceed a period of one year immediately preceding the date of the Receiving Order.

Sec.33. This section not to be limited to distraint but also to cover
(4) executions.

Sec.33. Joint creditors to have no right of proof in the separate
(6) estates in competition with the separate creditors.

Sec.37 The relation back of the Trustee's title under Sec.37 is often
negated by the operation of Secs.44 and 45. Frequently it is
quite impossible for the Trustee to prove that persons receiving
payment from the bankrupt had knowledge of an act of bankruptcy
and the bankrupt can by not disclosing that he has committed an
act of bankruptcy effectively prefer a particular creditor or
obtain some advantage for himself.

Could not all payments of money or transfers of property
made after the date of an available act of bankruptcy be void
against the Trustee unless the payments or transfers were made in
order to protect the estate or in the case of a trader clearly
made in the normal course of business. Sec.44 should be amended
to cover payments or transfers made after a petition has been
filed but before the date of the Receiving Order; apparently such
payments are now protected by the case of re Seymour (1937).

Sec.51. This should cover income of all descriptions.

Sec.54. Property of the bankrupt burdened with onerous covenants should
not automatically become vested in the Trustee unless and until
he has received notice to elect under sub-section (4) or alterna-
tively the Trustee's time for disclaiming should not be limited to
12 months subject again to the rights of interested parties under
Sec.54(4).

Sec.130. The Provisions of Part I of the Bankruptcy Act where applicable
also to apply to this section.

D. Generally

Statutes of Limitation: Time ceases to run after the Order of
Adjudication as regards Proofs of Debt and this should also apply in
regard to claims against third parties.

Rule 364: It is suggested that the copy of the Trustee's Cash Book
in duplicate should be in similar form to the Cash Book and that carbon
copies be permitted. The separate copying involves considerable and
unnecessary time and labour.

Is it really necessary that the Trustee should obtain from the Court
an office copy of the Statement of Affairs on the first audit of his
accounts by the Board of Trade and to mark on each the assets realised?
There could be a simpler method of supplying the Board of Trade with the
Statement of Affairs and the accounts give the necessary information.

(Sgl.) TORQUIL J.M. MACLEOD

22nd December, 1955.

Mr. Torquill John Murdoch Macleod, C.A.
 Mr. Henry Herbert Gordon

} of Messrs. Elles Reeve & Co.

Called and examined

351. Chairman: Mr. Torquill Macleod, I think you are a member of the Institute of Chartered Accountants in Scotland? - (Mr. Macleod): Of Scotland.
352. I think you were a partner of the late Mr. Salaman? - That is so.
353. You have considerable experience as trustee in bankruptcy and under deeds of arrangement? - Not so many deeds of arrangement.
354. But you have done company liquidation work as well? - Yes.
355. I think we might say you have a practical experience of the insolvency of people other than yourself? - I think that is a fair comment.
356. I think Mr. Waterer explained to you that these books before you show the two Acts as we have provisionally amended them? - Yes.
357. The amendments are, of course, not finally settled yet, and therefore I must ask you to treat anything you see in these books as confidential. - Yes.
358. As you know, the main question we have to consider is the problem of the undischarged bankrupt. We have provisionally adopted a scheme which is slightly different from the one that was circulated to you. You remember in the one circulated to you the idea was that every bankrupt's discharge should be considered by the Court. The scheme we have provisionally adopted does not provide for that, but it does provide for any bankrupt against whom a caveat is entered being subjected to pretty rigorous control, having to report his movements and his accounts to the Official Receiver. Under the other scheme that duty would only apply to a bankrupt whose discharge was actually refused. I do not know which of the two schemes you think in principle is the better? - I am looking at your proposed Section 26(2). I am glad to see there that the caveat can be entered on the application of the Official Receiver or of the trustee. I think the trustee was left out in the original scheme that was circulated.
359. I think he was. As the subsection is at present drafted, the trustee can apply on the conclusion of the public examination but not during the two years. The right to apply for a caveat during the two year period is confined to the Official Receiver at present. I do not know if you would like to see the word "Trustee" in there as well? - I would like to see the trustee having that right as well. In my view the public examination is very often held too early for the trustee really to take full advantage of it, and frequently matters arise after the examination has been concluded on which the trustee wishes subsequently to comment. Also he may wish to draw the attention of the Court to matters relating to the bankrupt's conduct or dealings which have come to light since the conclusion of the public examination.
360. He could, of course, always report to the Official Receiver, could he not? - He could do. But I should have thought that it would have been helpful to a trustee to have had the right to apply personally during the two years.
361. Our idea in limiting it to the Official Receiver was that the sort of ground on which application would be made during the two years was on matters of conduct, which are the concern of the Official Receiver rather than the trustee. In spite of that, you think it would be helpful to trustees to have that power? - I think it would be.

362. In your memorandum, you say you would like to see the requirements upon bankrupts to inform the Official Receiver of their change of address, and so on, applied to all bankrupts until they were effectively discharged? - Yes.
363. Is that not going to involve the Official Receiver and his staff in a terrible lot of work? - It certainly would. We would not wish to burden the Official Receiver with any unnecessary work, but I should have thought it might have been as well for all bankrupts to be under a duty to give this information and any change of address, either to the Official Receiver or to the trustee.
364. If it were provided that every bankrupt was under a duty to disclose his property to the trustee, do you not think that would be enough in the case of the fairly innocent bankrupt? - Mr. Gordon has drawn my attention to the case where the bankrupt has a life policy which the trustee keeps alive. The bankrupt may not communicate with the Official Receiver who consequently does not know whether he is dead or alive.
365. He is hardly likely to notify you of his own death, is he? - He ought to keep in touch.
366. But in the case of a life policy, in general you would surrender it, would you not? - As a rule, yes. Some we might keep. - (Mr. Gordon): There are cases in which it is important we should know where a debtor is. In one case at the present moment, we have a life interest under a will. We cannot sell it because we do not know where the debtor is. He is believed to be alive but he has disappeared for the time being.
367. Then you do not think these increased powers under the discharge scheme are adequate? - (Mr. Macleod): We would like generally to see more control of the bankrupt during the period of suspension and that might be most effectively done by the proposed amendments, which I do not think were in the proposal circulated.
368. The second thing I see you suggest about automatic discharge is that the bankrupt, before his automatic discharge, must make an application to the Official Receiver and inform him about various things such as his present financial position, and so on. I do not know if when you put that in your memorandum you realised there are about 40,000 undischarged bankrupts at the moment? - There we were trying to deal with the question of an automatic discharge. As we saw it, it would be only those who wished to be discharged who would make an application, probably not the whole 40,000, and only those applying would have to comply with those conditions.
369. In that case it would not be consistent with an automatic discharge. It would only apply to those bankrupts not content with automatic discharge, who wanted to get a discharge through the Court? - We felt there must be some differences of treatment as between different existing bankrupts. They could not all be exactly the same. Therefore something ought to be done by the existing bankrupts before they were given an automatic discharge.
370. We are very much obliged to you for your suggestion that there should not be an automatic discharge in cases where the bankrupt has failed to surrender. Your last suggestion about automatic discharge is that the trustee should file in Court a certificate regarding the bankrupt's conduct. Would not that in fact give the trustee a power of veto? - It might.
371. Does not that seem a bit drastic? - There we are only dealing with existing undischarged bankrupts. Some of them of course have been most unsatisfactory in their conduct and in their attendance on the trustee, and so on. It seems that some report should be made to the Court by the trustee in each individual case when they make an application, if in fact they are to be called upon to make one.

372. Would not the proper course, under the new scheme, be for the trustee, if dissatisfied with the conduct of any particular bankrupt, to report to the Official Receiver with a view to his applying for a caveat during the period of one year or two after the commencement of the Act? - Yes, I think that would meet the case.
373. Passing to another matter in your memorandum, you deal in paragraph 2 with the case of the second or subsequent bankruptcy. I think we are all in agreement with you that the assets acquired after bankruptcy No. 1 should be at the disposal of the creditors in bankruptcy No. 2. What about property in the nature of a windfall in the second bankruptcy? Suppose after the second bankruptcy had begun the bankrupt gets a legacy of something of that kind. Do you see any reason why both sets of creditors should participate so far as the legacy is concerned? - You would clearly have a joint and separate estate. The trustee in bankruptcy of the first bankruptcy would only participate in the windfall and not in any other aspects.
374. It seems to us there was no reason why it should not be done. - I see no reason why, if a windfall can be defined. I should have thought that if a windfall could be defined, and it was indeed a windfall, then creditors of the first bankruptcy might participate *pari passu* with the creditors of the second in that particular windfall.
375. Perhaps the use of the word "windfall" in this connection is a little misleading. If it was something that was an accretion to an asset acquired between the two bankruptcies, I should have thought that ought to be at the disposal of the second lot of creditors. But what the witness had in mind was windfalls in the nature of legacies and so on. - In view of that fuller description of what is meant by a windfall, I think your draft Section 39(1)(b), under which the creditors in a former bankruptcy only come in when the creditors in the later bankruptcy have been paid in full, is correct.
376. There is, of course, the danger in the suggestion made by the earlier witness of there being continual conflict between the two trustees, which is undesirable? - Yes.
377. I am not quite sure from your memorandum whether you are actually in favour of increasing the minimum petitioning creditor's debt to £100 or £150, or wish to leave it unchanged? - I think, to leave it, because in our experience nobody petitions for £50.
378. I see you would also like to leave the ceiling for summary disposal of the assets. Have you any particular reason for wishing it left, beyond what you state in your memorandum? - No.
379. Would you like to see the decision in *Re Pascoe* altered, so as to provide that after acquired property did not automatically vest in the trustee but vested in him only when he claimed it? - I think we would like to see an automatic vesting in the trustee.
380. Which is the case at the moment? - Yes.
381. Is it not rather a nuisance to the trustee to find that unbeknown to him he has for weeks or months been the owner of something in the nature of a white elephant? - (Mr. Gordon): More often than not it is not a white elephant. We are not merely dealing with onerous property which might be financially embarrassing. More often than not the property is not onerous. - (Mr. Macleod): In so far as it is onerous the trustee is, of course, saddled with responsibilities. I was thinking of the after-acquired property as an asset, not as a white elephant liability.
382. The same thing might be both, might it not? The bankrupt deals with a man who sells and buys white elephants. The trustee might be saddled with a beast he does not want. - There is the right of disclaimer.

383. Is that adequate in your opinion, or do you think the trustee ought to be left in a position where he can claim the property if he wants it and do nothing about it if he does not? - Yes, if he considers it of advantage to the creditors.
384. You do appreciate, do you not, there is considerable doubt whether the trustee is entitled to disclaim after acquired property? - Yes. At present there is no vesting in the trustee.
385. That is one of the troubles. Re Pascoe says it does vest automatically. It may well be that, through the bankrupt's action, the trustee at the moment might be saddled with something it would be dubious he could disclaim? - Yes.
386. I should have thought it would be better for him not to be automatically saddled with anything of that kind? - It is a very difficult question.
387. It is very difficult, I agree. Can we take it that, with some doubt, you rather feel in favour of preserving Re Pascoe? - With some reservation, yes.
388. If we may turn to another subject, you say you think the creditors should be able to appoint the Official Receiver as a trustee in a non-summary case by special resolution. Have you any particular reason for wishing it to be a special resolution? - At the present moment I think I am right in saying the Official Receiver cannot be appointed. It seemed to us that, if the creditor particularly wanted to appoint the Official Receiver, he should be able to do so. That was the only reason why we said by "special" resolution.
389. As regards irregular incomes, you make the interesting suggestion that, where money is ordered to be paid to the trustee, it should be retained for a fixed period so that the debtor can ask for some money to be paid to him during slack periods, when he is unemployed, for his maintenance? - Yes.
390. Do you think that is necessary, for two reasons: the Court first of all, before making the order, will of course consider the irregularity of the employment, and, secondly, under the existing law, the Official Receiver or trustee can make a bankrupt a subsistence allowance? I wonder if, in view of that, you think it is necessary to make this provision for irregular incomes? - We have experienced difficulty with bankrupts, such as actors who may be earning very high salaries and the trustee is unable to get any order because of this uncertainty. Our suggestion, we thought, dealt fairly with both aspects of the question, that is to say, it ensured that the creditors were not entirely deprived of any contribution by the bankrupt and, on the other hand, it meant that, if the bankrupt can establish that, in fact, the order that had been made was excessive, then the money, or part thereof, will be refunded.
391. Do you not think the existing provisions in regard to subsistence allowances and so on are adequate to meet that case? - No, not in our experience - not for people with irregular earnings.
392. You have in mind, I take it, people like actors or variety artists who get good money while at work and have long periods not making anything at all? - Yes.
393. Mr. Emerson: Might it not give rise to tax complications? - It could do, yes.
394. Chairman: You make two points about deeds of arrangement. First of all, you say all trustees' accounts should be audited as in bankruptcy? - Yes.
395. Is that not going to entail the most enormous amount of work to the Board of Trade? - Yes, I think it would. As I said earlier, our

experience of deeds is not as wide as it is in bankruptcy. I do not know whether there was any particular reason for raising this matter in the letter of invitation, but we certainly are of the opinion that the accounts should be audited as in bankruptcy.

396. There are between 300 and 400 deeds a year. Do you think the Board of Trade could effectively cope with 300 or 400 audits in each year in addition to its bankruptcy work? - I have not any information to give any helpful answer to that.

397. Mr. Emerson: Why do you consider that there should be differences from the procedure under a creditor's voluntary liquidation? The deed of arrangement is a private matter. What is your reason for wishing to differentiate? - I am not sure, if I had been asked the same question in regard to voluntary liquidations, that I would not give the same answer, I probably would. - (Mr. Gordon): Our comment was only made in answer to your question as to how matters should be tightened up. You asked in your letter what provisions could be made for more effective control. If a more effective control is desired then perhaps that is one of the ways of doing it. - (Mr. Macleod): There were no other grounds for putting it forward. We are not advocating a change in existing arrangements, but merely answering the questions put.

398. Chairman: You also suggest to property being sold without the consent of the Board of Trade or the committee of inspection, except by public auction. Have you any particular reason for that? - None, except to provide a more effective control of the activities of deed trustees. That is all.

399. Under your heading, "Further Suggestions", your first suggestion is that an accepted deed, that is a deed accepted by the requisite majority of creditors, should not be available as an act of bankruptcy. Why do you suggest that? It is rather a revolutionary idea, is it not? - Mr. Gordon reminds me we have had experience of a majority of creditors wanting a deed and one creditor standing out and using it as an act of bankruptcy, and then causing very great difficulty, either by upsetting the deed or else by getting paid out.

400. If we gave the Court power, on a petition founded on a deed, to dismiss the petition if the Court thought a receiving order was not in the interests of the general body of creditors, would that meet the case? - Yes.

401. We also propose cutting down the time for a petition founded on a deed to one month. Would you be in favour of that? - Yes.

402. I see you are wanting to eliminate the preferential claims for taxes except in regard to the tax year preceding the receiving order? - Yes.

403. Assuming we could get it through - a pretty big assumption - would you be in favour of eliminating them altogether? - No.

404. You would not? - No. We were only suggesting for your consideration that the Revenue should not be able to choose their year.

405. I appreciate that was your suggestion, but you would not like to go further? - No.

406. Mr. Lloyd Williams: You would take the last year? - Yes. The last year, as against a peak year.

407. Mr. Emerson: You mention Excess Profits Tax. Would that apply now? - (Mr. Gordon): Yes, it might apply.

408. Chairman: Mr. Macleod, I know you have a tremendous amount to do with Revenue cases. What is your experience of Revenue claims swamping the whole of an estate? - (Mr. Macleod): It frequently happens.

My suggestion to meet this is not to pick out the biggest year. They should be limited to the year prior to the date of the receiving order.

409. Mr. Lloyd Williams: The Revenue's claim may still swamp the others? - It may do, but not necessarily.
410. You think the last year would limit their activities to a considerable extent? - I think it would.
411. I gather from earlier witnesses that, if you limit the Revenue to the last year, it would cut down their claims very considerably. - That is so. We do find that trade creditors are not very pleased when they appreciate that the Revenue can claim the biggest year of all preferentially and that, in some cases, that year may be a very long time before the receiving order.
412. Chairman: That brings us to what you say about distraint. What we were proposing to do about distraint and execution was to simplify the position very considerably by providing that, if the distraining or judgment creditor, whichever the case may be, can manage to hold on for three weeks without having notice of a bankruptcy petition, then he has got home. Do you think that is a good idea or not? - Very good.
413. Taking it a little out of order from your memorandum, do you regard the present limit of what a bankrupt is allowed to keep as tools of trade etc. under Section 38 as having any reality in these days? - No.
414. Would you care to suggest a figure we should put in instead of the existing figure? - I have not given thought to it, but I do know the present one is quite inadequate.
415. There is also at the moment no machinery that I know of for deciding which particular articles a bankrupt is to keep if he had tools of trade and so on which together amount to more than the limit - whatever limit is fixed. Do you think there ought to be, or should it just be left to commonsense? - It is usually a matter of arrangement between the trustee and the bankrupt.
416. It is probably better left so? - I would have thought so.
417. Do you feel that, in these days, the doctrine of reputed ownership has any use? You can get practically anything in the world you want on hire purchase at the moment. - I have not particularly thought of it in relation to the Bankruptcy Act. I do not think I would go so far as getting rid of it entirely.
418. I want to ask one or two things about the Section dealing with preferences. Supposing that a man makes a payment with the object of preferring a surety, are you in favour of the trustee being required, as he is at present, to take proceedings against the principal creditor and leave the principal creditor to recover from the surety, or would you rather put the clock back and allow the trustee to shoot straight at the surety? - I think the simpler way for the trustee to deal with it and the more effective is to go straight for the surety.
419. Also, of course, it is rather hard luck on the principal creditor that he should have to bear the risk of the insolvency of the surety during the interval between the payment and the proceedings, is it not? - Yes. I think it is very difficult in cases of that kind to get equity.
420. We thought of making any payment by the bankrupt during, say, the three weeks before petition, or some such period of that sort, voidable as against the trustee, while retaining the present power of the trustee to set aside over a period of six months any payment made with a dominant intent to prefer. Do you think three weeks would be sufficient time? - I think 21 days is a very reasonable time.

421. You say that property burdened with onerous covenants should not, in your view, automatically become vested until the trustee has had notice to elect under sub-section (4) of Section 54. Does that mean that, if the bankrupt has got a valuable leasehold, it might become valueless to the trustee just because the landlord does not give a particular notice? If that is right it seems rather odd, does it not? - We have experienced considerable difficulty in leasehold properties which are subject to mortgage and, for some good reason or other, we have not disclaimed within the time allowed. We may have had offers for the property and one thing or another has delayed completion, and we have found ourselves in great difficulty over this question of disclaiming within the time.
422. You can always apply for an extension of time, can you not? - It is very difficult to get one in our experience. I must, however, admit that there is a conflict between our suggestion here and an earlier one in regard to after-acquired property. We are rather inconsistent in our view.
423. Why do you want the whole of Part I of the Act to apply to an administration in bankruptcy? - (Mr. Gordon): We do not see any reason why it should not. We have not any particular case in mind on that. We do not quite see why Part I should be excluded, that is all.
424. If we may we will pass on to your heading "Generally". I do not quite see why you want the Statute of Limitations to run against the trustee after the order of adjudication. It is rather hard luck on third parties against whom the trustees may have a claim, is it not? - (Mr. Macleod): We have had some experience of nothing having been done by the bankrupt to pursue a claim and six years having not quite expired before the trustee's appointment and the claim becoming statute barred as a result. It seemed to us that, if time ceased to run from the date of the receiving order, then it would put the trustee in a position to recover a claim which ought to have been recovered for the benefit of the creditors, although the bankrupt did not take the steps to recover it when he might well have done so.
425. Mr. Lloyd Williams: Are you not suggesting that the trustee should be in a better position than the debtor? - Not a better position, but able to do something the debtor was unwilling to do. The bankrupt may have reasons for not wishing to pursue his claim, which reasons may not be acceptable to the creditors. Therefore I feel that the time should not run against the trustee. For example, in the course of the 5½ years prior to the receiving order a bankrupt may not choose to pursue a claim against a third party for some reasons which would not be acceptable to creditors. Then there is only that very short time left for the trustee to catch up with the position. When he has done so he may well find that the Statute of Limitations has deprived him of all rights to make a claim.
426. Chairman: The debtor might have lent money to his aunt five years eleven months and twenty days before the adjudication and the unfortunate trustee has only ten days in which to make amends? - In so short a time he probably has not been able to discover what has happened.
427. Mr. Lloyd Williams: Could he not write a letter demanding payment? - No, to secure payment a writ must be issued. At present, the Statute only operates in favour of a creditor. It seemed to us fair it should work both ways.
428. Chairman: To give a trustee time to look round do you think it would be reasonable to provide that, for a period of, say, six months after the adjudication, the Act should cease to run? - That would certainly be helpful. Could it not be the same way as it is in regard to proofs of debt. Time does not run against a creditor after the receiving order.
429. We are obliged to you for your suggestion. We will consider whether to recommend that the Act should be stayed for a limited period, or whether to recommend that the Act should not run at all. But if we do not come to the conclusion that we should do the latter, you

would agree that even the limited period would be of some help? - Definitely.

430. Your other two recommendations concern Rules, and they are not strictly in our purview. There are one or two other points I wanted to ask you about, just briefly. Would you be in favour of a provision forbidding a creditor being a trustee, and as such having to deal with his own proof? It can happen at the moment, and it seems rather undesirable. - It is sometimes of advantage, of course, to have the same person as trustee of two estates where there is an association between the two estates and the trustee. I am thinking of the case where a trustee in bankruptcy has a claim against another estate. He becomes a creditor and could, at present, put in a proof and a proxy for his own appointment.

431. Mr. Lloyd Williams: But he would not be a trustee in that second estate in which he is lodging a proof, would he? - I think he could be.

432. Mr. Emerson: I think what you are saying is this. Supposing you personally were acting as trustee in a bankruptcy, and one of your book debts was very substantial, and you could not collect it and made that debtor bankrupt. You would like to preserve the position of being able to act as trustee in that event? - Yes. I can quite see the simple case where it might be undesirable for a creditor in his own right to have himself appointed as trustee but, on the other hand, there are cases where a trustee in bankruptcy has a large claim against a debtor, and he has got to pursue that claim. He, therefore, becomes a creditor, gets judgment, the debtor is made bankrupt and the trustee puts in a proof and a proxy for his own appointment. That would, in fact, be a creditor being a trustee, but sometimes that is desirable.

433. Chairman: Then you would not be in favour of providing that a creditor should not be a trustee? - I do not think so.

434. Mr. Lloyd Williams: Could you be impartial in such a case? - On the only occasion I have had to do this, I had separate legal advice. I did not have the same solicitors in each case.

435. Could you be impartial as creditor and trustee, which you should be? - That is, of course, the great objection to it.

436. You do agree it would be difficult to be impartial? - Yes, for a trustee who is a creditor in his own right.

437. Chairman: There are at present certain rather rigid rules about the time for payment of a first dividend. As a matter of fact, they are more honoured in the breach than in the observance. It is four months, at present. Would you be in favour of increasing that to, say, six months, or something of that sort? - Yes.

438. As regards the final dividend, at present the time factor is at the discretion of the trustee and the committee of inspection. Would you be in favour of making it at the sole discretion of the trustee, because what happens if there is a conflict between the two of them I do not know? - I think you appeal to the general body of creditors. I should have thought it was right to leave it as it is.

439. Just one other matter. In the case of a deceased insolvent, would you be in favour of abolishing the executor's right of retainer? - Mr. Gordon says 'Yes', but I am not sure. - (Mr. Gordon): I do not see why they should be preferred. Very often they can swamp the whole estate. I cannot see any reason why it should not be abolished.

440. Thank you, Mr. Macleod. That is all I need to ask you. I do not know if there are any further points you would like to put to us? - (Mr. Macleod): May we just deal with one short point, which seemed to us rather important? - (Mr. Gordon): What we had in mind was on the fraudulent preference Section, when the act has to be committed. The Act

provides now for the act being committed prior to the date of the petition, and not after the petition. I think it is re Seymour.

441. We are in entire agreement with you about that. The present position is quite ridiculous? - (Mr. Macleod): Yes. I thought I would just let you know.

442. Thank you both very much.

(The witnesses withdrew)

LETTER RECEIVED FROM MR. TORQUIL JOHN MURDOCH MACLEOD, C.A.

4, Bucklersbury,
Chesapside,
London, E.C.4.

17th May, 1956.

The Secretary,
Bankruptcy Law Amendment Committee.

Dear Sir,

I return herewith the draft notes of my attendance before the Committee. I have made certain corrections and amplifications which I shall be glad if you will incorporate in the final text.

I wish to qualify my observations made to the Committee in regard to the preferential claims of the Inland Revenue.

The objection of trade creditors to the Revenue being allowed, as at present, to choose any year as preferential is that the year chosen may be several years before the Receiving Order. In the meanwhile, the bankrupt has continued to trade and incurred further liabilities and often his assets are swamped by the preferential claim of the Revenue.

In these circumstances my more considered view is that the Revenue should be entitled to claim preferentially any one of the three years immediately preceding the Receiving Order.

In my original view of the matter I had thought that the preferential claim of the Revenue should be on exactly the same basis as other preferential creditors, namely, limited to a period immediately preceding the Receiving Order.

In view of the basis on which tax assessments are made and the rights of appeal available to a tax payer, it appears to me, on reflection, that it would not be fair, either to the Revenue or to tax payers at large, to limit the preferential year to the year immediately preceding the Receiving Order.

I shall be glad, therefore, if you can incorporate this qualification in the note of my evidence.

Yours faithfully,

(Sgd.) T.J.M. MACLEOD.

Wednesday, 25th April, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. REER, C.B.	
MR. C.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. N.B. CRESSWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

MEMORANDUM SUBMITTED BY MR. WILLIAM FOY CRESSWELL, C.B.E.,SENIOR OFFICIAL RECEIVER, HIGH COURT1. DISCHARGE

(i) The scheme as outlined appears to be workable.

(ii) It would however entail the loss of after-acquired funds, the High Court yearly figure might average about £25,000 for thirty-five re-opened cases. This loss however need not be altogether deplored. Some re-opened cases are hard ones. A bankrupt who has unwittingly failed to apply for his discharge may die after making good, leaving an elderly widow unprovided for. The assets would be taken for creditors who have long since written off their debts; some of the creditors might not be traceable.

(iii) Some arrangement would be needed to continue to encourage the co-operative bankrupt to make voluntary payments. At present in about one in ten of High Court discharges an Order is made for payment to the estate. The Order usually crystallises an offer to pay something out of his earnings made by the bankrupt at the close of his Public Examination. By such voluntary payments the bankrupt hopes for favourable treatment when he applies for his discharge later on. If he is to get his discharge automatically, there will be no incentive to make payments. The situation might be met by entering a caveat in all paying cases. At the hearing a lump sum payable by the bankrupt could be fixed and he would then know the extent of his commitment. This should gain the applicant either an immediate discharge or a short suspension coupled with the Order for payment.

Alternatively a Section 51 Order could be applied for. To make this effective all earnings would have to be subject to that Section. Section 51 Orders however are seldom satisfactory as bankrupts by their nature are unreliable and often fall out of or are discharged from their employment.

(iv) Fixing an effective date for discharge at the conclusion of the Public Examination may present difficulties. "Caveat" cases would include all the complex ones. Realisation of assets (sometimes complicated rights of Action) and the settlement of proofs of debt would still need time. The hearing might need to be fixed so long as a year hence.

(v) In all cases, automatic or otherwise, a Court Order recording the discharge would be needed on the Court File.

(vi) Provision to mitigate the position of existing undischarged bankrupts might be made by enacting that, except where the discharge has been refused, no after-acquired property shall be claimed if three years have expired from the conclusion of the Public Examination, and that no bankrupt whose discharge has not been refused and whose Public Examination has been concluded shall be prosecuted for Section 155 offences after that time.

2. ASSETS WHERE AN UNDISCHARGED BANKRUPT BECOMES BANKRUPT FOR SECOND TIME

If automatic discharge becomes effective, there will seldom be in future a second bankruptcy where the bankrupt is undischarged from a previous one. Existing bankruptcies could be brought into line by applying assets in possession of the bankrupt at his second bankruptcy to the debts owing in the second bankruptcy.

3. INCREASE IN MONETARY LIMITS

The minimum for a petitioning creditor's debt should be increased to say £200. The costs of an unopposed judgment together with the costs of filing a bankruptcy petition total about £40. These costs are out of proportion to the recovery of a debt for only £50. Moreover the Bankruptcy Court machinery is expensive and ought not to be put into motion to investigate and wind-up an estate with a trifling debt of £50.

The limit for summary cases might well be raised to say £1000.

4. VESTING OF AFTER-ACQUIRED PROPERTY

The decision re Pascoe has resulted in a Trustee being saddled with onerous property which he then has to disclaim. This is wasteful of time and paper. After-acquired property should vest only when the Trustee intervenes.

5. THE APPOINTMENT OF OFFICIAL RECEIVER AS TRUSTEE IN NON-SUMMARY CASES

This is done at present by using the resolution: "That no Trustee other than the Official Receiver be appointed". No good purpose seems to be served now by Section 19(5) and this sub-section might well be repealed.

6. RE-VESTING OF SURPLUS PROPERTY

No special difficulty has been experienced under existing legislation.

7. SECTION 51 ORDERS

Workmen's earnings nowadays are substantial. All earnings should be subject to section 51. The Court always takes into consideration the debtor's financial responsibilities before making an Order.

8. BANKRUPTCY PROSECUTION BY THE BOARD OF TRADE

No objection is seen to the Board of Trade undertaking all prosecutions under the Bankruptcy Acts.

9. DEEDS OF ARRANGEMENT

No comment.

10. PREFERENTIAL TAX

Section 33, 1(a) should be re-drafted to ensure that the Inland Revenue obtain preferential payment only for the assessment for the financial year ending in the April before the Receiving Order.

The present interpretation (frowned upon by the Divisional Court but restored by the Court of Appeal in re Pratt 1951 ch.225 C.A.) allows the Inland Revenue to select any one year which best suits its interest.

This practice often results in the Inland Revenue sweeping up all available funds for a debt which has been outstanding for years.

This discourages creditors acting on Committees of Inspection or taking any further interest in the proceedings.

Allowing preferential payment is at conflict with the recovery of preferences to creditors before the proceedings and with the idea of creditors being paid *pari passu* (Section 33(7)).

The heavy preferential payment of an old tax debt may absorb the proceeds of goods recently provided by unpaid trade creditors. No good reason can be seen for (in effect) imposing upon the unfortunate trade creditors, payment of the bankrupt's income tax arrears.

The selection of any one year by the Inland Revenue for a preferential tax payment conflicts with all the other preferential payments mentioned in Section 33, all of which are tied to the date of the Receiving Order. Indeed the Inland Revenue themselves can claim for P.A.Y.E. arrears only during the year before the Receiving Order.

A heavy outstanding preferential tax debt can frustrate the Court dealing with an application for Discharge. It may, for example, be desired to provide for a dividend for general creditors whom the bankrupt treated dishonestly. It may well be beyond the capacity of the bankrupt to consent to Judgment for so large a sum as to clear the tax debt and provide a dividend.

11. The minor suggestions submitted by the Inspector General in his letter of the 21st October 1955 are supported.

(sgd.) W.F. CRESSWELL

Senior Official Receiver.

19th December, 1955.

EXAMINATION OF WITNESS

Mr. William Foy Cresswell, C.B.E., Senior Official Receiver, High Court

Called and examined

443. **Chairman:** Mr. Cresswell, I think Mr. Waterer has explained to you that these books before you contain provisional drafts of the Acts as we think they ought to be amended. As it is all provisional, I must ask you for the time being to treat anything you see in them as confidential. - (Mr. Cresswell): Certainly.

444. I think you are the Senior Official Receiver, High Court? - In bankruptcy.

445. And I think you also hold a curious position, being Official Assignee in respect of pre-1884 bankruptcies? - Yes.

446. I am not of course suggesting that you have held that post since 1884, but how long have you held it? - Since 1st January 1948. I came into office then. It goes with the Senior Official Receiver's post.

447. The first thing we have been asked to consider is this problem of discharges, and I suggest that just at the moment we forgot about existing undischarged bankrupts. Broadly speaking we have got two possible schemes before us, in which the main difference would be this: under the first scheme every bankrupt's discharge is considered by the Court and, if a caveat is entered, the Court fixes a day for hearing the bankrupt's discharge, which as you pointed out may have to be a considerable time ahead, and considers the discharge very much as it does now. The other scheme was this, that in a proper case the Court can enter a caveat, either at the conclusion of the public examination or within a

limited period thereafter, on the application of the Official Receiver or possibly the Official Receiver or trustee, and, if the Court does enter a caveat, then it is up to the bankrupt to apply for his discharge in the same manner as he has to at present. Do I make myself clear? - Yes, I think I have got it.

448. Broadly speaking, which of these schemes do you favour? - I should have thought the first one, because in the second case you would leave a certain proportion of bankrupts still to apply for their discharge. They may not apply, so you have still got your problem - smaller in size, it is true, but still there.

449. We have had a calculation made of the number of bankrupts likely to be caveated under the second scheme. As far as it goes, the information tends to show that the numbers would not be unmanageable if the second scheme were adopted. The estimate is that the figure of bankrupts subject to caveat at any one time would rise fairly steeply to a peak of approximately 2,400 for the whole of the country, and then would remain fairly constant. - I am afraid I do not understand what is to be done about those people. Is there some procedure to be adopted to encourage them to apply for their discharge?

450. They become, as I think one of us has jocularly termed them, the Official Receiver's pen pals. - I see, they keep in touch with him.

451. They would have to report to the Official Receiver periodically about their financial position, notify any change of name or address, and so on, so that it is possible to keep an eye on them. - That would mean then that all undischarged bankrupts would have to keep in touch.

452. We thought all bankrupts against whom caveat was entered. - Would not the others in the second scheme be discharged at some time?

453. Under the second scheme the caveated bankrupt would not get his discharge until he asked for it, but of course the uncaveated bankrupt would be automatically discharged at the expiration of a certain time. - So he would pass out of our purview anyway after a certain time.

454. He would in due course, yes. - I should have thought the first scheme is better. Everyone against whom a caveat has been entered would then be brought before the Court and the Court's decision about him would be recorded on our public search index at Bankruptcy Buildings. The public could then find out the Court's opinion about any particular bankrupt.

455. They would know the Court's opinion about every caveated bankrupt by the mere fact that a caveat was entered? - That, generally, he is unsatisfactory - that is all.

456. If the period of automatic discharge was two years, there would be no point in entering a caveat against a man unless his conduct was thought to be so bad that if he applied for his discharge at present he would be suspended for two years or more? - Yes, and they would be relatively few in number.

457. That is what we thought. Then, taking it broadly speaking, you are of the opinion that the first scheme - which incidentally is the one circulated to you - is the better of the two? - I think so, because it brings the caveated bankrupt before the Court, and we get a definite order indicating what the Court thinks about him. I should guess that only a few of those applying for their discharge would be refused, because refusal now means that the man has been distinctly fraudulent, probably done a term of imprisonment or something like that.

458. Do you not think refusals would be a bit more common, because at least if the first scheme is adopted the Court would have to consider a number of cases which at the moment it does not consider at all? - Yes, there would be more refusals recorded, I agree. But, you see, the

man who wants to go around and say: "It is true I went through the bankruptcy court a few years ago, but you know I can go in at any time and get my discharge", will not be able to say that under this new procedure, whichever scheme is adopted.

459. We were all interested in your figure of £25,000 for loss of after acquired funds. That is for the High Court alone? - That is my figure. From what I can gather from my colleagues in the provinces the proportion of reopened cases with them is not so great as ours. That is probably because we get the man who lives in the West End of London. He often has some interest under a will or something of that kind, possibly family connections which are more likely to produce assets in a High Court case than in the provincial case.

460. Mr. Lloyd Williams: So as far as the provinces are concerned you would consider that figure to be negligible and not worth considering? - I do not think it is worth considering. It is negligible compared with the annual value of assets of all bankruptcies of about £2½ million. Moreover, some after acquired assets are, in my view, sometimes unjustly taken, possibly from the widow of a bankrupt and not from the bankrupt himself.

461. Chairman: But whichever scheme for dealing with discharges were adopted, presumably there would be some compensating gain in what would be roped in in the way of after-acquired property from either caveated or refused bankrupts, which might otherwise escape? - I am not optimistic about that. Your caveated bankrupt is not the sort of fellow who acquires property; he lives on his wits, he spends what he gets, he does not save it up, that is my view.

462. Passing on now to your third point about discharges, do you think that if Section 51 were enlarged to apply to all classes of earnings, and it were made clear that an order made under Section 51 could be made so as to be effective after discharge, any further provision is necessary to encourage the co-operative bankrupt to put up money? - I think we should lose money. Under a Section 51 application, you must go to the Court and establish your case. I once applied to the Court for some of a prominent actor's money, but I was defeated because I could not show that he had any long-term contracts. And while the Registrar gave me a certain amount of sympathy, he did not give me an order. If the case of re Hutton is still to apply, it is still going to be rather difficult to get an order. I would rather encourage the bankrupt to make his offer while he is in the public Court. That is the proper and effective time. After showing him his misdeeds, and that there is a good deal of responsibility on his own shoulders for his failure, you then say: "What are you going to do about it? You want to do something for your creditors, do you not?" He dare not say no, so he says yes. Then you say: "Do not let us just have words, let us have some money", and then we get a bit.

463. I do not see why you should not have that, whichever of these schemes is adopted. He has got to go through the public examination, and he has got the possibility of a caveat hanging over his head, which ought to induce him to make an offer if he can. - I have been thinking about that, whether we could use the threat of a caveat as a lever against him and say: "Look, unless you make a firm undertaking, we shall have to apply to the Court for a caveat". I do not like that very much, because as a rule the paying bankrupt is the co-operative bankrupt. He is willing to do something, even if reluctantly. I would not like to threaten the co-operative bankrupt with a caveat. It seems to me a little unfair. But I see no alternative.

464. The bankrupt knows presumably that the possibility of a caveat is there, which is not a harmful thing from the creditors' point of view. I think we all felt that in many cases the effectiveness of a caveat would not be in its imposition but in the possibility of its imposition, just as it is the threat of imprisonment more than imprisonment itself which gets money out of a judgment debtor on a judgment summons. In making these answers I am not sure that you realised that, at any rate under the second

scheme, the caveat need not necessarily be applied for at the end of the public examination, but it could be applied for at any rate by the Official Receiver at any time during the two years. - Yes, that would be more helpful in the case of the potentially paying bankrupt. It would strengthen our hands. Thinking as I go, could I say that I would favour the first proposal if the caveat could be applied for within the two years from the conclusion of the public examination, rather than at the conclusion or not at all.

465. You would really favour an amalgam of the two proposals? - That is what it amounts to, I gather, yes.

466. Mr. Emerson: Would you be in favour of the application being able to be made by the trustee as well as by the Official Receiver? - Yes, I think the trustee should be able to apply where it is a question of collecting money.

467. Chairman: We were at first inclined to think that the caveat was likely to be applied for, mainly if not exclusively, in respect of matters of conduct, and that therefore it would really be in the province of the Official Receiver to make the application. - Yes, but conduct is linked with payment. If a man is in a good salaried position and says: "Let the creditors go hang, I am not paying anything", that is the sort of thing the Court ought to take notice of.

468. Which brings us back to Section 51. Supposing that a reasonably good chap does not apply for his discharge, but waits to get his automatic discharge, is not your remedy to go under Section 51? - We can use Section 51, if he has got a steady job.

469. Then you do not want any other machinery besides that, do you, to meet the case where the bankrupt does not apply for his discharge? - I do not think you could have any other machinery. I think we should have to do as we do now, informally get the debtor to promise something at his public examination, and let it be known to him before the public examination, through chats with the examiner, that there is such a thing as a caveat and that we should have no hesitation in asking for it unless he shows willing. I think that might work.

470. As you say, the person who ought to warn him about the existence of the possibility of a caveat is the examiner, on the occasion of the preliminary examination. - Yes, I think that usually happens, at any rate in the High Court. Long before the bankrupt comes into Court he knows what he is in for.

471. The fourth point you make about discharges is the difficulty of fixing a date for hearing the discharge application at the conclusion of the public examination. If you take the second scheme, which so far we have provisionally adopted, that seems to meet that difficulty, does it not? - It does, yes.

472. Which is one of its great advantages? - Yes.

473. Taking your fifth point on discharges, your opinion is that in all cases there should be a Court order recording the discharge? - Only where the debtor needs it. Many debtors applying for jobs, or where they are being taken on as company directors, need evidence from the Court that they are discharged. Therefore there must be some procedure to give it them.

474. My own personal idea is that where an automatic discharge came about simply by lapse of time, somebody in the Court would simply put a minute on the file noting that so much time had elapsed and that consequently there had been a discharge. - This is really Court work and not my side, but I would respectfully suggest that the debtor who wants an order of Court applies for it and pays £1 for it. We then get a fee. The Court officer will then look at the proceedings and find whether a caveat has been entered. If not, and two years have elapsed, or whatever

the period is, since the conclusion of the public examination, then, so far as the Court is concerned the order may be issued.

475. You do not anticipate that the debtor who wants evidence of the discharge which he has already got should have to make any formal application by a solicitor or counsel, or anything? - No, he goes to the Court Office and asks for an office copy of the order, and it is in those cases only that the Registrar would have a clerk draw up an order and signed for filing on the Court file. The Court ought not to be troubled unless and until the debtor needs his order.

476. Do you not think all the world ought to have some sort of notice of a discharge? Ought it not to be gazetted in all cases? - That could be done without a great deal of trouble. It could be done by the Registrar's clerks, I should have thought. It is a straightforward matter and it should not cost an awful lot.

477. Mr. Lloyd Williams: There might be some difficulty if the case gets transferred to another Court. - No, the clerk keeps a diary. As the public examinations are concluded, and as part of the signing of the transcript of the public examination, the case is noted in the diary two years hence. Then, if the debtor is granted an automatic discharge, the clerk puts something on the Court file. He could draw up an order, I should have thought. That would be the best thing, I favour an order signed by the Registrar as it would be evidence and the debtor could get an authentic copy of it.

478. Chairman: Of course, if there were provision for gazetting he would hardly ever need a certificate from the Court. He would merely get a copy of the London Gazette and produce it. - The Gazette would be evidence, but who is going to pay for all that? Still, that is not my problem, that is for the Inspector General.

479. As regards the matter which we left out of consideration for the moment, that is, existing undischarged bankrupts, I think the easiest thing I can do is to ask you kindly to refer to our draft Section 168 (3). We thought of making two modifications to that as a result of evidence we have already heard. One was to introduce into subsection 3(a), which deals with the bankrupts who would not be automatically discharged, not only the bankrupt who has previously been adjudged bankrupt but also the bankrupt who has never surrendered to his bankruptcy. It has also been suggested that the time when the automatic discharge takes place should be two years after the commencement of the Act, instead of one year. I do not know if you would be in favour of those modifications, or if you think it is better as it stands? - I would agree to bringing in the non-surrender bankrupt, because we know very little about him.

480. There is also the bankrupt whose public examination has been adjourned sine die. You would agree that he ought to be denied an automatic discharge too? - Yes. Let me see if I understand this: the new Act comes into force, you have a whole mass of undischarged bankrupts, and where the existing bankrupt has previously been bankrupt he does not get an automatic discharge.

481. Or where he has failed to surrender or where his public examination has been adjourned sine die. - Yes, and he must apply for his discharge if he wants it, after getting his public examination concluded.

482. He must apply for discharge if he wants it, as he does now. - In theory I agree that is desirable but I am wondering about the weight of the work, because our machine has a very limited capacity.

483. I should not have thought myself that you need worry very much about that, because if he is such a black sheep that his discharge has been refused, then he does not come into the picture at all. If on the other hand, he has been adjudged bankrupt twice, or has failed to surrender, or has had his public examination adjourned sine die, he is not going to come up voluntarily and face the music in many cases, is he? - The

last two, no; in the first one he might. But there cannot be any great numbers there. It depends really on how many formal applications for discharge we are going to lose under the automatic procedure. My own guess is that most of the reports we now have to write will not be required. But those we do have to write are going to be very troublesome. In a straightforward case of a failure of a trader, the evidence is there as a rule, you have got accounts showing that he ran into losses, and so on but, in the case of the fraudulent bankrupt, there is usually a good deal of conflicting evidence, and it takes much more time to prepare the report.

484. Mr. Lloyd Williams: The majority of your reports today relate to the inoffensive debtor, do they not? - Yes. The "non-caveated" bankrupt.

485. So you would lose the largest proportion of your reports? - I think we would, but we would get in exchange a smaller number of more troublesome reports.

486. Chairman: Would you be in favour of one year or two years for the automatic discharge of existing undischarged bankrupts? One year does not give the Official Receiver very much time to look around? - Why not make it two years, so as to keep the existing bankrupts in line with the new ones.

487. Two years has been suggested as an amendment, and we were wondering whether you would prefer two. - I think so.

488. Subject to those possible alterations, do you think that those provisions deal adequately with the formidable problem of existing undischarged bankrupts? - Yes. I do not know what it involved in sub-section (3)(b). I take it we should be concerned to apply for a caveat only in those cases where we are having trouble with a bankrupt - where he has been prosecuted, for example, and we have heard something about him to his disfavour since the proceedings.

489. Yes. There is also the case of the bankrupt who ought, if he had applied for his discharge, to have had his discharge suspended for a very substantial period. A certain number of those black sheep will inevitably escape under this clause, but what we thought was that, where the bankrupt's public examination was concluded within, say, two years back from the coming into force of the Act, his conduct would be fairly fresh in the mind of the Official Receiver, the trustee, and the creditors. - So if we have a bankrupt fresh in our minds we apply for a caveat.

490. If you think that he is so bad that he ought not to be discharged within two years from the coming into force of the Act. - I have not quite sorted that out. It strikes me as being a little unfair. You are going to catch some existing bankrupts, and be nasty to them, and the others you are going to leave alone, if their cases happen to have occurred three or four years before.

491. Is it going to be so very unfair? The man who has been forgotten will have been undischarged, by the time the two years are up, for perhaps four years, something of that kind, or perhaps more, and there are not very many discharges suspended for more than that time under the existing system. - (Mr. Sherwell): Does it not mean that you will have two years to decide which are the undesirable, and then apply for a caveat? - (Mr. Cresswell): I am not clear about this - do I have to search through all my records and pick out the undesirables?

492. Chairman: I fancy you will not in fact search all your records. You will only apply for a caveat where a trustee or a creditor comes and reminds you of Mr. Brown or Mr. Jones, who was so dishonest, and you then say: "Yes I remember that ruffian, I will apply for a caveat". I do not imagine that you will go searching through the files off your own bat. - We could not do it. I do not like a hit or miss business. I think the ruffians should all either be caught or should all be let go.

493. I do not see how the black sheep who is deservedly hit can complain because another sheep equally black will escape? - My own inclination in general is to let the existing bankrupts lie. If they want their discharge, let them apply under the existing procedure which is the procedure under which they were made bankrupt. I have suggested in my memorandum that there might be some mitigation, that they should not be prosecuted for credit offences, and that sort of thing, so as to make it a little less harsh. But I am not happy about that suggestion.
494. Frankly I did not very much like the suggestion you made in that form. I think the same end would be achieved in what seems a rather better way by the provisions of this subsection. - You are really leaving us with a right to stop the automatic discharge of an existing bankrupt who is under our attention, or is within our recollection as a bad case.
495. Yes, that is the effect of it. While we are on this Section, I wonder if I might ask you something in your less arduous capacity of Official Assignee. In subsection (4) you will see that we make provision for all pending bankruptcies being continued as they would have been continued if the new Act had never come into force. If such a provision is enacted do you think it is necessary to preserve the Fourth Schedule to the present Act which contains provisions relating to pre-1884 bankruptcies? - No, I do not. My Official Assignee duties are negligible. I sign a list of balances each year, and I have collected £50 this very day in an 1867 case. I do not know how the balances in the accounts of these pre-1884 estates originated. Whether they are dividends due to people who cannot be found, or whether they are some kind of undistributed funds, I do not know. Finance Division of the Board of Trade would have to be asked whether they have any knowledge of their origin. I have no historical papers. All I have inherited is the list of balances, and I certify once a year that the balances have not moved or that, if they have moved, the new balances are correctly shown in the list submitted to Finance Division of the Board of Trade. Who has that money at the moment, I do not know. The total of the credit balances in the old ledger accounts is £48,000. The High Court official who deals with the custody of old files thinks the balances are dividends due to creditors who cannot be found, so that I could take no action that would advance the matter or get rid of the money. In the last eight years I have had only one balance disturbed, and that is as I say in the 1867 case, where I have just got £50. It would have been much better if my title had become extinct. As things are, the Dublin people, who had a plot of land on which they wanted to build a new school, had to come to me, because my bankrupt had a remote interest in this land. My solicitors have now sold my interest for £50, but the £50 will not benefit creditors.
496. What solution would you recommend? - I would submit that the title of Official Assignee for pre-1884 cases be extinguished and the outstanding balances be suitably dealt with. I am told by the Court official that all the files up to 1883 have been destroyed. I have a print of an order made on the 9th December 1932, authorising the destruction of all proceedings under the Relief of Insolvent Debtors Act, 1813, the Bankruptcy Act, 1831, the Bankruptcy Law Consolidation Act, 1849, the Private Arrangements Act, 1844, and Acts for the Relief of Insolvent Debtors, 1842, commonly known as the Gentlemen's (Non-Traders) Acts. Those were destroyed under this authority of 1932, but I understand there is a later order giving authority for the destruction of the files up to the Bankruptcy Act 1883. I have preserved the ledgers showing the balances, but that is all I have got.
497. It seems then that it could do no harm, and would do a certain amount of good, if we removed from the Act the Schedule containing these extremely antiquated provisions? - So far as I can see, yes. I would not perpetuate it.
498. As regards the question of subsequent bankruptcies, which is the next thing you deal with, it has been suggested that the old creditors and the new should share alike in assets which might come into existence by way of after-acquired property in the second bankruptcy and

which were of a casual nature, such as legacies to the bankrupt paid after the second bankruptcy begins. This introduced a new complication and I do not know whether you would be in favour of it or not? - I would say broadly that there should be nothing for the creditors in the first bankruptcy until the bankrupt has paid his debts in his second bankruptcy. I would agree that if any after-acquired property came in enabling him to pay twenty shillings in the pound to the later group of creditors, and there was a surplus, that surplus might go to satisfy the creditors in the first bankruptcy. But I suggest that the bankrupt in his second insolvency would have no surplus of assets for his first creditors. If an account be taken of the bankrupt's financial position on the second occasion, there is no surplus for the first lot of creditors, because the current assets are not even enough to get rid of his current liabilities.

499. That is what we thought, but the suggestion has been put forward that the moral justification for paying out the second lot of creditors first is that the assets which are available to the second trustee have been acquired by the credit given by the second lot of creditors, whereas if, after the second bankruptcy began, the bankrupt's aunt died and left him £1,000, there is no moral reason why the second lot of creditors should have it any more than the first, or vice versa. - They are more recent and administratively easier to find. Also they might have been persuaded to give credit on the bankrupt's expectations from his aunt. Administratively I would say, put all the assets into the second bankruptcy; then, if there is a surplus, let the first bankruptcy creditors have it.

500. Mr. Emmerson: On this question of after acquired property I wonder whether I might come back to paragraph (vi) of your memorandum for a moment. You make a suggestion there that if at the present time there is an undischarged bankrupt whose public examination was concluded three years ago, if the new Act comes into force we could not touch any of his after-acquired property? - I have not said that, have I?

501. I think that is what the effect would be, is it not? - Yes, that is quite right. I suppose the existing bankrupt should have roughly the benefits you are giving to the new bankrupts but I am rather doubtful about it. That was all I could think of to mitigate what might appear to be an unfair position. You always get marginal cases, there is always a dividing line, and by and large I would prefer to leave the existing bankrupts alone. They can come along and apply for their discharge if they want it; but I was a little unhappy about prosecuting for credit offences a man who perhaps for the sake of a £2 or £3 fee has not applied for his discharge so far. I felt that was a little unfair if you are going to give the new bankrupt an automatic discharge after two years.

502. Chairman: We did not quite follow why you think the minimum for a petitioning creditor's debt should be so greatly increased. After all, if the man cannot pay £50, it is more than likely that he cannot pay his other creditors if he has other creditors, is it not? - Yes. The case I had in mind - it is very rare - is the case of the spiteful creditor. We had one not so long ago where the creditor refused to take any instalments, held the debt at £50 and put the chap through our mill just to get him into the Court and ask a lot of spiteful questions at the public examination. That is costly.

503. Would it not be met if the Court were empowered to dismiss the application if it thought that the receiving order was not in the interests of the general body of creditors? - Yes, if that could be evenly applied. I think that might well prevent the spiteful creditor going on with a small debt. My point there was the disproportion of the cost of getting payment for £50 debt by putting the man into bankruptcy.

504. Normally speaking, what you get by going to bankruptcy is not payment of your debt but an even distribution of the assets among all the creditors? - Yes.

505. I do not myself quite see why, if a man is owed £50, he should not be as much entitled to ask the Court for an even distribution of assets as the next man. - Then why does he not go for an investigation of means and get an order for so much a week, or something like that?
506. You mean, go by judgment summons? - Yes, why not? Bankruptcy procedure is relatively cumbersome; preliminary examination; notices to creditors of first meeting; a public examination - a short public examination costs £5 now for a transcript; £6 petition stamp; £7.10s. deposited with the Official Receiver; petition costs £30; all to collect £50, which he then probably does not get.
507. Mr. Emerson: He might not be the only creditor? - I agree.
508. Mr. Lloyd Williams: Surely the case must be extremely rare where the debtor's only liability is £50? - Very rare indeed.
509. Such cases are negligible, are they not? - I have no statistics, but they are few.
510. You start with a debt of £50, and when you investigate his affairs you find the debts run into hundreds? - Yes.
511. Chairman: And after all we must remember that, even under the law as it stands, if he has only got one creditor that is a ground on which the Court may dismiss the petition? - Yes, it probably is not a problem, but the figure has remained at £50 since 1883 and if the legislature then thought the creditor ought not to come in until £50 was owing, ought we not to make it a bit higher before we put this cumbersome machinery into action over quite a small case? That is all I have got in mind.
512. You are proposing that we should raise the ceiling for summary cases to £1,000. Is there any particular magic in four figures, or is this roughly proportionate to the fall in the value of money? - The latter, though £1,000 is probably worth less than £300 was in 1883; I should have thought it should be quite £1,000. The other point is that the difficult case is often not the case with assets. We hand cases over to the trustees which I would be perfectly happy to keep; it only means putting in a valuer or an auctioneer to sell the stuff; we have already done a lot ourselves, preserving, removing and storing, and there is only the next step, to sell, followed by the distribution of the funds to creditors, and so on, for which we have machinery working every day.
513. Whilst we are on the subject of figures, you probably remember that under Section 23 at the moment a man is liable to be arrested for removing property above the value of £5. That clearly ought to go up, ought it not? - Yes.
514. I do not know if you have any figure to suggest there? - I cannot imagine any bankruptcy judge giving us an order if only £5 worth of property was removed.
515. It would mean that a man could not walk across the road with a suit of clothes on his back? - Yes, but what should the figure be? We do not want to encourage them to walk away.
516. The Inspector General suggested £50, and he also suggested £50 for tools of trade, bedding, and so on. - I was just going to say, why not make the figure in Section 23 the same amount as the allowances in Section 38. I think there is some justice in that.
517. I do not know what figure you have in mind as regards the allowances. £20 of course goes nowhere. £50 has been suggested by the Inspector General, and I think we thought of £100. - We got occasionally the instrumentalist from the top class orchestra who wants to keep his instruments which are quite valuable nowadays. We try to persuade him to buy them from us.

518. Or alternatively get a cheaper instrument? - Then he would lose his job, possibly.
519. Would he? - Yes. Some of them become fond of their instruments. I have a bankrupt now with a French horn, I think it is, which he inherited from his father round about 1880, and he is very fond of it; we want him to keep it if he can pay for it. I suppose £100 is not out of the way, and if that will enable the bankrupt to carry on with his work and pay us something, I see no great objection to raising it to that figure.
520. As regards Section 19(6) we were proposing to give the Board of Trade a discretion by amending the subsection to read "the Board of Trade may appoint". - I agree with "may appoint". It is almost impossible to say to the Board of Trade that they shall appoint, because they have to find somebody, and that may be difficult.
521. I think "may" is much better than "shall". - I agree.
522. In that case do you still want to retain Section 19(5)? At the moment I do not see that it serves any useful purpose. - I would take it out. It is silly to have to explain to creditors that they cannot nominate the Official Receiver as trustee, and then go on to say - "But if you refuse to appoint anyone else, to enable me to close this meeting I must have a resolution and you had better do it this way - no trustee other than the Official Receiver shall be appointed". I should have thought that subsection (5) could come out. We have to take the case if creditors will not appoint outside trustees, and creditors often ask us to take cases nowadays.
523. If you cannot escape being saddled with the trusteeship anyhow, it does not matter whether the provision is there or not, it might as well come out? - Where we have got to keep the case it would be rather nice to know that the creditors have resolved that the Official Receiver should be trustee. It is something of a compliment.
524. I was rather surprised at you saying that, so far as your experience goes, you have had no trouble about the existing provision to revest a surplus in a bankrupt. At the moment it seems, at any rate as regards land and the like, that there would have to be an actual documentary transfer to get it back. - I have no experience of such a case. I had a very troublesome bankrupt whose debts were paid in full. There had been no need to realise some furniture in store and I did not want any more of an income paid under a trust. All I did was to write to the trustees to say that I required no more of the income for the purposes of the bankruptcy, and authorising them to pay it in future to the bankrupt. Similarly with the stored furniture, I paid the charges up to date and said "This asset is required for the purposes of bankruptcy, and I leave you to account to the bankrupt for it".
525. Have you ever had trouble with creditors who come in and prove at the last moment when you are just going to declare a surplus, and thereby so to speak upset the appellation? - No, we are always cautious. I myself would not allow a surplus to be paid over unless I was sure from the papers that we had exhausted every possibility to find claims. If I suspect that there is a debt still outstanding, I hold the balance, and ask the debtor to help us find the creditor.
526. It is a problem that you have had to grapple with only in cases where you have been trustee? - Yes.
527. And it is not really a problem that affects you as Official Receiver? - No, I can only say I have not met any particular difficulty about it.
528. I wonder if, before we leave this subject you would like to have a look at our redraft of Section 69. Perhaps the easiest thing would be if you read it through at your leisure and told us if you have any views about it. We thought that we would have to extend quite considerably, perhaps to as much as three months, the period of seven days

mentioned in that Section as the time allowed to the trustee to file his accounts after payment of the final dividends. - Yes, it would be tidy to have an automatic annulment. We would certainly want more than seven days.

529. I think we are all agreed about that. It is rather unfair to ask you to criticise in detail something you have only just seen this minute, but do you feel in principle that machinery would be practicable? - So far as I am concerned, yes. I do not know how the Registrars will view that, because at present, of course, an annulment is an indulgence. The debtor's conduct has to be taken into account, and if the debtor's conduct is gravely unsatisfactory, one of our High Court Registrars at least would refuse to annul, and would insist on the man applying for his discharge.

530. Even if he paid twenty shillings in the pound? - Yes.

531. We will be hearing one or two of the Registrars, and we must find out their views about it. - I must not speak for them, of course. I would say that no great harm would be done by doing it this way, provided you would give us more than seven days to clear up matters.

532. Mr. Sherwell: One witness suggested allowing fourteen days from the final audit. - I would say at least twenty eight days from the audit. We sometimes do get these troublesome old debts, you know.

533. Chairman: We were in agreement with what you say about prosecution by the Board of Trade. Would you be in favour of allowing private persons to prosecute for bankruptcy offences if they had obtained the permission of, say, the Director, or do you think they ought to be given free hand to prosecute if they wish? - I see no reason why they should not get the law operating against their debtor if he has defrauded them.

534. You might get the case of the fraudulent bankrupt who, long before the evidence against him is complete, gets a friend to prosecute him, is subsequently acquitted, and thereby is armed with a defence against the Board of Trade when they have got their evidence in order. Wouldn't this be a very unfortunate result from allowing private persons to prosecute? - Yes. I had in mind the case of the powerful creditor for example, a bank, who, as I understand it, the Director is reluctant to spend money over, but I do see that there is a possibility of collusion.

535. Mr. Lloyd Williams: I do not think the Director would be against prosecution by a powerful private creditor if he thought the case was sufficiently proved and the evidence was there. - In that event, I wonder whether you need trouble him.

536. What I understand he really wanted was to put a stay on the case, so that other people did not get in too early, because he would want to consider the case, and, as a result of that consideration possibly bring a prosecution for something very substantial in three or four months' time which he otherwise might be prevented from doing. - I can only speak from my experience, as it were, on the sideline. The C.I.D. Fraud Squad are so very good these days. As a rule, if the creditor knows the matter is being dealt with officially, that is to say the Fraud Squad are making enquiries, he is perfectly prepared to leave it to them to cover every possible complaint. I think he would prefer to go to the detective in charge and give him a statement about their particular case, and hope that it would add weight to the others.

537. Having to ask for his consent might decide the Director to set the ball rolling with the Fraud Squad? - Indeed yes, there is that about it. There is also the wider aspect of the public interest. It perhaps ought not to be left to the individual to chase up another individual. The creditor may be feeling rather incensed whereas the D.P.P. would be more objective about it.

538. Chairman: You do not offer any comment about deeds of arrangement, because you do not have very much to do with them, do you? - No.

539. I see that you are in favour of restricting the preferential period for taxes to the tax year preceding the year in which the receiving order is made? - Yes.
540. And not letting the Revenue choose their year? - Yes.
541. You would not think of going the whole hog and depriving them of any right of preference at all? - I would, but could it be achieved.
542. Whether Parliament would agree to it, I admit is problematical, but you think it would be right in principle? - I do think so. I do not like preferential payments. The act is based on payment *pari passu* to the general body of creditors. A creditor brings in a bankruptcy petition to recover his debt, and then finds that all he has done is to help the Inland Revenue to recover arrears of tax which have been owing for some years.
543. Mr. Emerson: You would not exclude all preferential creditors? - Wages I might except. But in bankruptcy we are not getting many wages claims, because we deal nowadays with few businesses. Failures of businesses with numerous employees are dealt with under companies liquidation, I imagine, far more than on our bankruptcy side.
544. Chairman: Whatever we decide about our recommendation as regards preferences, do you see any reason to treat rates differently from taxes? - No, but rates are tied to the receiving order at the moment. The rating authority cannot go right back. They come in for their more or less current rates.
545. If we sweep away all preferentials you would be in favour of sweeping away rates and taxes? - And National Insurance, and P.A.Y.E. Let us divide the assets among the creditors rateably.
546. While we are on the subject of the Crown, I do not know if you have any views about mutual credit and set-off in relation to the Crown? - I certainly have. The omnibus set-off I think, is quite illogical and unfair to the general creditor.
547. In other words the Post Office and the War Office should not be treated as the same concern? - No. And when the Customs put in a proof for purchase tax and, in effect say "If this debtor is entitled to any sum from the Crown whatsoever and wheresoever", I refuse to admit their proof, because they have not valued their security.
548. Mr. Beer: What would you think should be done in the case where the functions of one Government department are transferred to another? For instance, the Ministry of Materials might be involved. The Ministry of Materials is now part of the Board of Trade. In effect it is the same Government department. - I think mutuality ought to have a restricted interpretation whichever particular set of civil servants are dealing with the matter.
549. Chairman: In those circumstances there would be mutuality? - I am not sure that there would be, not if you regard the departments of the Board of Trade as separate entities, as they are. If the Industries and Manufactures Department of the Board try to set-off something against the Commercial Relations and Exports Department, I would say there is no mutuality. There are different businesses, different administrations.
550. Mr. Beer: In one case the debits and credits might arise from the control of raw materials, and the control itself may be transferred, as indeed it has been, from the Ministry of Materials which no longer exists to a Department of the Board of Trade. It is the same Department in each case wearing a different label? - If a debtor has obtained bricks, say, from I and M Department of the Board of Trade - this is only an example - if he has obtained bricks and so owes I and M money, and if I and M owe him money, there is mutuality, but if he obtains bricks from I and M and some different department owes him something, there is no mutuality I would say.

551. The case I have in mind is where the debtor owes money, shall we say, in respect of raw materials, and then the functions of the raw materials Ministry are transferred to the Board of Trade. It seemed a bit illogical, does it not, merely because you transfer a function from one Ministry to another, that mutuality should disappear? - If mutuality depends on which set of civil servants are doing a particular job of work at a particular time, I am all against mutuality.

552. Mr. Lloyd Williams: I see that you say that, as the thing stands at present, the Inland Revenue can only recover P.A.Y.E. arrears for the year preceding the receiving order? - Yes, I think that is so, is it not?

553. They have never disputed that that is all they can claim? - They have only recently acquired that right.

554. They asked for that right of preference for that one year? - I presume so. I do not know the origin of that legislation, but it must have emanated from the Inland Revenue.

555. Chairman: I would just like to ask a few miscellaneous questions. It has been suggested to us that the time fixed, it is true by Rule, for compliance with a bankruptcy notice, and for filing an affidavit of counter-claim are both inadequate. Have you any views about that? It is seven days and nine days at the moment. - I should have thought that is long enough. As a rule you have already obtained judgment when you issue your bankruptcy notice, and the debtor by then would know his position. He has the debt facing him, and it should not take more than seven days to say how he can compound the debt, or make an offer of some kind. I would not increase the opportunity for delaying tactics on the part of debtors. They make full use of them at the moment in the High Court at any rate.

556. Do you think the time limit provided for the filing of the statement of affairs is adequate? It is three days on a debtor's petition, and five on a creditor's. - We rarely get a statement of affairs in in that time.

557. It would be more realistic to put a considerably longer time? - I should give 28 days in both cases, because the important document in the statement of affairs from the Official Receiver's point of view is the deficiency account. If something is slipped in in order to file a statement on time, we should almost certainly have to ask for an amended deficiency account.

558. Would you be in favour of a power for the Court to dispense with the public examination where a composition provides for and secures payment of twenty shillings in the pound? - Yes. At present, the creditors have an opportunity to say "We detest this fellow so much we will not take his money, we would rather have him adjudicated" and if the creditors will not accept the composition it will not get any further. The public examination would then follow. But I think if creditors are content to take the composition there is no need to put the debtor in the box. We have few compositions, but in my experience they are mostly cases of extravagance where the conduct is pretty innocuous, and there is an absence of fraud.

559. Mr. Emerson: Surely if twenty shillings in the pound is paid the Court would refuse an order in the creditors' own interest? - (Chairman): Not absolutely necessarily I should have thought. The man's conduct might be so bad that it is thought desirable for the public examination to go on, even though his rich uncle is putting up sufficient money to pay twenty shillings in the pound. - (Mr. Cresswell): You have that possibility. I should have thought the creditors' control there would have sufficed. If they are incensed with the debtor they will say, I think, "We will not let him go. He must go on and have his public examination and come up for his discharge later on". Under the new regime it would probably be a caveat case.

560. Chairman: There is a provision in the Companies' Act for persons who advance money for the purpose of paying wages to be treated preferentially. I do not know if you would like to see that imported into bankruptcy, or not? - I have not thought about that. The only case where it is justified, I think, is where the wages have created assets which the creditors are going to have, but I do not know whether you could qualify it like that. The drafting to meet that kind of case would be very difficult. Generally I would be against it. Anybody who keeps a business going that is on the way to failure is not doing anyone any good. They are helping the debtor to continue trading with knowledge of insolvency.

561. That is what we thought. We thought it was like providing the assistant burglar with a first charge on the swag. - I would not put it so severely as that, but by and large I do not think it is the sort of thing that ought to be encouraged.

562. We thought of recommending a simplification of the law relating to distresses and executions. What we thought of recommending was that if the creditor concerned can manage to hold what he has seized for 21 days without a notice of bankruptcy petition, then he should be entitled to keep the benefit of his distress or execution, whereas if he gets notice within 21 days he has to part with it; in other words 21 days hit or miss. Would you think that would be appropriate? - I think it would be excellent. I am all for creditors going in to recover their debts, and if some of them would be more active about it debtors would not be allowed to go on trading in a state of insolvency.

563. Another period of 21 days we thought of introducing was a period of 21 days before the receiving order. If during that period the bankrupt made a preferential payment it should be recoverable without proof of intent. I do not know if you have any views about that. We would have, of course, to put in some sort of protection which would enable him to buy his daily bread, and pay money to the credit of his bank account, and so on. - That would mean we would have to scrutinise all payments within 21 days of the receiving order. I have a case on now in which the debtor has 64 bank accounts and transactions of half a million pounds have passed through them. I have no doubt we would have some hundreds of transactions within three weeks of the receiving order.

564. It would be more a problem for the trustees than for you? - Yes, but we are trustees in a large number of cases.

565. It would be your headache in those cases where you were trustee. It would not be a headache for an Official Receiver as such? - Except that we would be asked to deal with it at the public examination. That is where you establish your fraudulent preference. I think I would let it go. I do not know whether it would produce any money. I feel myself if a creditor pursues his debtor and gets his money, he ought to be allowed to keep it, within reason, until the receiving order comes down. I agree that if the debtor makes available cash over to the members of his family, that is an undesirable thing.

566. Mr. Emerson: You appreciate that, under the new proposal, there would be no need to establish fraudulent preference in respect of sums paid within 21 days, so you would not have the onus of establishing that? - You would take it back, unless it is used in buying necessities, or something of that kind? Well, take the case of a man living with his wife's parents. He pays his father-in-law £20, and the father-in-law says "I kept him, I bought the groceries, and so on". You then take an account from the father-in-law to see how much of the money was used for the debtor's benefit, I suppose. I would like to know how much work that is going to give us. In general I do not think recovery of all payments within 21 days of the receiving order would be workable.

567. Chairman: While we are on the subject of preferences, I do not know if you have any views on the question of payments made with intent to prefer a surety. You remember that Mr. Justice Eve took the

view that the trustee in that case can go to the surety direct and not shoot at the principal creditor, which leaves the principal creditor to pursue his remedy against the surety. Mr. Justice Clauson took exactly the opposite view. I do not know which one you would like to see established? - Let me see if I understand it. Where the debtor scratches up all available money, clears his overdraft, and thus releases the life policy to his wife, then should we go for the wife? I think we should. That, of course, goes against what I have been saying that we do not want to worry about preferences within 21 days.

568. What we felt was that it is somewhat unfair that the risk of the surety having become bankrupt, or fled the country, or anything of that sort, should be borne not by the estate, but by the innocent principal creditor. - Yes, it does not seem to me that you can fairly attack the creditor, the bank, for example, who had the overdraft paid up. On the general question, I think I would say leave the preference procedure as it stands. It is fairly useful in the case of a flagrant benefit to a member of the family, but I am hesitant to agree to putting a duty on the trustee to look into every payment within, say, 21 days of the receiving order and try and get it back. We would have to apply in all cases, but in many we should not get it back. It would give a lot of work, and I am all against demanding things from people if you know you cannot follow up effectively. It gets you into a situation where people say "You need not trouble about the Official Receiver's demand, tear it up, he will not pursue it".

569. You would not like to express an opinion on the question of surety as against the principal creditor? It is a difficult matter to ask you to answer off the reel, I know. - I think we should go for a surety who has been benefited and to the extent only that he has benefited, and not for the creditor who has had his debt repaid.

570. Changing the subject, rather, do you see any use in retaining the doctrine of reputed ownership in this day and age? - No, it is quite ineffective.

571. Have you any views about the executor's right of retainer in Section 130 cases? - I see no reason why an executor should be able to retain a loan which he may have made to the deceased debtor. Certainly executors should have the funeral expenses, the testamentary expenses, and that kind of thing, but they should not be able to retain any debt that happens to be owing to them. There seems to me no justification for that.

572. Would you be in favour of permitting creditors to give general proxies to persons not in their permanent employment? - Yes. Often they give proxies to their solicitor, and it is rather hard to say to the solicitor "I cannot let you use this", because after all he may be advising them about the whole matter. But could you restrict that to reputable people? I do not think in this day and age there is so much danger of proxies being misused. I have a feeling that the tight proxy regulations which, as I understand it, were devised to make sure that the creditor signed these things himself, and did not allow other people to do it for him, are obsolete. I think that danger has largely gone. I would have thought let him give a general proxy to anyone over 21 years of age.

573. For voting, or would you allow the proxy to get on to the committee of inspection? - No, I think the committee of inspection ought perhaps to be subject to a stricter procedure.

574. It should be more restricted? The solicitor or accountant should not serve on it? It should be the actual creditors or their servants? - I would not mind a solicitor going on, or an accountant, but I would not like to see the next door neighbour coming along, and that kind of thing, because he happened to have a day off.

575. The next two things I was coming to on the committee of inspection are related. We thought that, if the creditor appointed his solicitor or accountant as his general proxy, and the general proxy got

on to the committee of inspection, it should be provided that he should be unremunerated in respect of what he did on the committee. But another witness has suggested to us, and it is a rather revolutionary suggestion, that some modest remuneration should be paid to the committee members who attend meetings with the object of attracting them to the meeting. Those are two irreconcilable views. I do not know what view you have about it? - There would be a lot of inroads into the funds, what with the Board of Trade fees, trustees' remuneration, and the committee members' expenses. You see, reasonable expenses for a high executive in the business world are probably five or ten guineas a day.

576. It was not suggested they should be paid anything like that, but that they should be paid something corresponding to what would be paid to a witness for attendance in Court. - Yes, that might be better.

577. Mr. Lloyd Williams: Is there a likelihood if you did pay them that you would have far more meetings? - You would ensure more attendances at meetings. But I doubt whether a modest payment would result in more meetings being held.

578. You would have a far larger number of meetings, if only to say how-do? - Maybe. As to the solicitor, I would not pay him for attending, because if the creditor wants his solicitor to go along so as to save his own time, or because the solicitor will be more effective, then the creditor should pay him. That is a private matter between the creditor and his proxy holder. Perhaps something like modest witness fees might be paid. I think they might have their travelling expenses, within reason.

579. Chairman: I think they get those now. - Probably they do. My own practice is to try to get a committee elected which is within shouting distance of the trustee's office, if that is possible, and not to put people on who are in the provinces, to save the expenses. I would say generally I am against the committee being paid.

580. Mr. Emerson: There is one question I would like to ask you, and that is on the taxation of costs. There seem to be three schemes suggested, the first is to abolish taxation of costs, except for solicitors, the second is to raise the figure below which no taxation is necessary, and the third is leave it as it is. I was wondering what your view is. - I think it unnecessary to tax auctioneers' and valuers' costs, where there is already a clear out scale, and where the out of pockets anyway are required to be certified by the Official Receiver before the bill is taxed. I should have thought you could have left the trustee to vet his auctioneers' and valuers' bill, because as a rule his instructions to such agents are precise. The charges can surely be left to the trustee to say whether they are reasonable or not. The auditors also can look at it and if they feel the trustee is being a little generous they can say so.

581. Broadly speaking you would restrict taxation to solicitor's costs only? - I think I would, yes. We tax, for example, do we not, even shorthand writers' costs. That is ridiculous. There is a fixed scale there, and no possibility of marginal charges. It just increases the paper work and the fees. I would say, tax only solicitors' costs, the others to be subject to the scrutiny of the trustee and admission by him.

582. Chairman: Thank you very much indeed, both for your memorandum, and for your help this afternoon.

(The witness withdrew)

SIXTH DAY

Monday, 7th May, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. FRIDGE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.B.P. MACEAVISH	} Joint
MR. C. ROY WATERER, I.S.O.	

Secretaries

LETTER RECEIVED FROM MR. PAUL ADAMS.

CHIEF TAXING MASTER, SUPREME COURT

Supreme Court Taxing Office,
Royal Courts of Justice,
Strand, London, W.C.2.

25th November, 1955.

The Secretary,
Board of Trade,
Insurance and Companies Dept.

Sir,

Bankruptcy Law Amendment Committee

The matters to which your letter of 2nd November refers do not appear to be directly concerned with the taxation of costs. My attention has, however, been drawn to a paragraph in the Solicitors' Journal, 21st November 1953, Vol. 97, page 788, where, under the heading "Costs of Solicitor for Trustee in Bankruptcy", it states that the Council of the Law Society has received a promise that the question of the disallowance of costs to the Solicitor of the Trustee in Bankruptcy where there has been failure to obtain authorisation for his employment under Sections 56 and 83 of the Bankruptcy Act, will receive attention when the next Bankruptcy Bill comes before Parliament.

If it is contemplated that these sections should be amended, may I please have an opportunity of expressing my views on the proposed amendments. In the meantime may the following observations be taken into consideration:-

By Section 56(3) of the Bankruptcy Act a Trustee may employ a Solicitor or other agent to take any proceedings or do any business which may be sanctioned by the Committee of Inspection. The sanction given should not be a general permission but only permission to do the particular thing or things for which permission is sought in the specified case.

Section 83(3) provides for the taxation of the bills of Solicitors etc. and states "the Taxing Master shall satisfy himself before passing such bills and charges that the employment of such Solicitors and other persons in respect of the particular matters out of which such charges arise has been duly sanctioned. The sanction must be obtained before the employment, except in cases of urgency, and in such cases it must be shown that no undue delay took place in obtaining sanction". It is no doubt right that there

should be this safeguard to the incurring of costs and expenses, but it is frequently urged that there is hardship upon a Solicitor who has his costs disallowed because a Trustee failed to get the proper Sanction. Some sympathy may be felt with this view where the Trustee has endeavoured to obtain authority but has failed to obtain a meeting of a quorum of the Committee of Inspection as is required by Section 20 of the Act.

Under Section 20(0) of the Act the Board of Trade can give the necessary authorisation if there is no Committee of Inspection. It might be considered whether this power of the Board of Trade should not be extended to cases where a Trustee is unable to obtain a meeting of the Committee of Inspection.

An alternative to which resort has been had in some cases is to obtain authorisation by way of a postal vote instead of holding a meeting. This procedure has been frowned upon by judicial decisions on more than one occasion and, with respect, it is submitted rightly, because a submission to the members of the Committee of Inspection of some cases requiring authorisation by post cannot adequately indicate all the possibilities which are involved, such as can be made plain by a discussion at a meeting. As matters stand at present sanction authorised by a postal vote is not accepted, and it is submitted this position should be maintained.

At the present time, if the Trustee cannot get a quorum after repeated attempts, it would seem he must call a meeting of the creditors for the appointment of a new committee, and even if such were then appointed there may still be difficulty in persuading its members to attend meetings, a difficulty which notoriously exists where members of a Committee of Inspection are representatives of large commercial undertakings.

Under Section 245(1)(c) of The Companies Act 1948 The Liquidator in a winding up by the Court shall with the sanction of the Court or the Committee of Inspection have power to appoint a Solicitor to assist him. Under Bankruptcy Rule 106(1) applications for relief as to limit of costs are made to the Registrar. Might the Registrar not be given power to deal with any difficulty arising over obtaining a sanction required by Section 56(3) of the Bankruptcy Act? This would be much cheaper than application by way of motion to the Bankruptcy Judge.

Turning to the question of the Deeds of Arrangement Act 1914, may it be considered whether some provision should be made for the costs of a Trustee under a Deed of Arrangement to be taxed in the Court having jurisdiction in bankruptcy in the district in which the debtor resided?

Section 15(1) of the Act states that in certain circumstances the Board of Trade have power to require production of a certificate for taxed costs, but the Act is silent as to the method of taxation. When taxation is required in the High Court the procedure has been for the Taxing Master to tax by request and consent of the Trustees under the deed and his Solicitors. It would appear that application could be made to the Court under Section 23 of the Act but although this method has been adopted in a few cases in the past, where no consent was forthcoming, some doubt has been felt as to whether the Court has a discretion under this Section to make an Order for taxation.

A simple amendment to the Act in this respect would clarify the position.

Yours faithfully,

(Sgd.) PAUL ADAMS
Chief Master.

Costs of Solicitor for Trustee in Bankruptcy

The Council of The Law Society draw the attention of solicitors in the November issue of the Law Society's Gazette to ss. 56(3) and 83(3) of the Bankruptcy Act, 1914, and rr. 106 and 107 of the Bankruptcy Rules, 1952, and the serious consequences of failing to observe them. The taxing master has to satisfy himself that the charges of a solicitor acting for a trustee in bankruptcy are in respect of matters which have been duly sanctioned by the committee of inspection before the employment, or, in cases of urgency, without undue delay. The committee of inspection must specify a limit for such costs, and this limit may be increased on subsequent application. A failure to specify a limit or to authorise an increase can be rectified by the court under r. 106, but if the sanction of the committee of inspection is not given at all before the solicitor begins the employment, the whole of his bill of costs, including conveying costs, for work he has done for the trustee, will be disallowed. The Council have received a promise that this matter will receive attention when the next Bankruptcy Bill comes before Parliament.

EXAMINATION OF WITNESSES

Mr. Paul Adams	}	Chief Taxing Master, Supreme Court
Mr. Thomas George Thomas		Principal Clerk, Bankruptcy Taxing Office

Called and examined

583. Chairman: Mr. Adams, we are going to put before you two books, one of which contains a provisional draft of the Bankruptcy Act as we think it ought to be amended, and the other a provisional draft of the Deeds of Arrangement Act. As these amendments are not yet final we must ask you to kindly treat them as confidential for the time being. -
(Mr. Adams): Certainly.

584. I think you are Chief Taxing Master of the Supreme Court Taxing Office? - Yes.

585. Am I right in thinking that you were a Taxing Master before you became Chief Taxing Master? - Yes.

586. I thought you were, and you have had great experience in the subject. We are very much indebted to you for your memorandum. The first thing you deal with is this problem about the trustee who is unable to get his committee together to sanction the employment of, say, a solicitor? - Yes.

587. One thing we thought of doing, as you will see set out in the thicker book, was providing that the sanction for the employment of a solicitor should be obtained either before his employment or within three months thereafter. Would that help, do you think? - If I may say so, that seems both vague and undesirable.

588. Is it? - Well, I say it is vague because the question will then arise as to the date from which the three months is to be calculated. Is it three months from the first employment of the solicitor, or whoever it is, or can any act be sanctioned in retrospect within three months of its being done? That is the sort of problem with which we are being faced always on taxations.

589. If we do put such a suggestion forward we shall have to button it up a bit, so to speak, to make it clear from what date the three months arise? - Yes. For a trustee to be able to employ a solicitor, for example, to bring proceedings, and for the matter to be allowed to run for three months with the consequent incurring of liability for costs, not only of the solicitor but by the other side, before he need obtain permission, seems to me highly undesirable. It goes a long way to render nugatory the position concerning the limit under Rule 106(1).

590. Would you favour a shorter, but specified, period or rather have it left as it is? - I do not think a shorter period would be of any assistance at all. I think it would have to be a longer period to be of any practical use, but the longer the period the greater the danger of the matter being allowed to run on, with the other party having to incur expenses, and the more undesirable it becomes. What I would advocate much more strongly is that, if there is genuine difficulty over the operation of the subsection as far as sanction is concerned, the remedy should not be to relax the control, the necessity for which has been emphasised by the Courts on so many occasions, but to make the machinery for obtaining the sanction easier in cases where there is genuine difficulty in obtaining it, or rather genuine difficulty in convening a meeting of the committee of inspection.

591. Is there any difficulty in convening a meeting? I should have thought the difficulty was to get the people there. - Yes. You can always call them but the strong probability is that they will not come. In those cases my suggestion, of course, was that, where you can show that there is such difficulty in getting them to come, the Board of Trade, for example, should have power to give sanction similar to the power that they have under Section 20(10) in cases where there is no committee, or alternatively, that the Court should be given the power to authorise these matters in cases of difficulty. In other words that the Court should have the power, similar to the power which is given to it under Rule 106(1) in relation to extending the limit.

592. You suggest in your memorandum three possible ways of meeting this difficulty; firstly the Board of Trade; secondly, a postal vote of the committee; and thirdly, the Court. Which of these do you prefer? - Certainly not a postal vote. I am absolutely against a postal vote. That has been frowned on by the High Courts in Bankruptcy, and in 1936 a practice direction was issued by Mr. Justice Farwell to make this clear. In a recent case last year Mr. Justice Harman referred to the practice direction and confirmed it. I would have thought that the Board of Trade already having that power under Section 20(10) where there is no committee might equally well exercise it in a case of difficulty where there is a committee.

593. You put the postal vote last of the three? - A long way last.

594. The Board of Trade first and the Registrar second, or the Court second? - Yes, the Court comes second, be it the Judge or the Registrar, according to whatever practice may be required.

595. But you have a preference for the Board of Trade; it is not actually a photo-finish? - Yes. I put it that way simply because the Board of Trade have that power where there is no committee.

596. Mr. Emmerson: Is your suggestion that it would be a good thing for the trustee to have to apply to the Board of Trade for permission to employ a solicitor to collect a small book debt, for example? - What you mean is, is it necessary to have any sanction at all in that connection? Is that it?

597. No. I mean, is it necessary to have sanction for comparatively trivial matters? - Well, my answer to that would be that many more illustrious people than I have emphasised, time and time again, the necessity for sanction, and I would have thought that it was advisable to keep control over all these matters. The moment you start employing a solicitor you are not only incurring expense in employing him but you may be running up expenses on the other side of the law suit.

598. Does it matter about the other side as far as you are concerned? The costs to the other side would not be the responsibility of the Taxing Master? - No, I am not concerned. But it may affect the estate, that is all, and that is what we are worried about. I am not concerned about the Taxing Masters at all.
599. Chairman: If the trustee institutes an action without the necessary sanction and loses it, he pays the costs himself; he cannot reimburse himself out of the estate? - That would probably be so.
600. That is how it is at the moment, and then it is the trustee's funeral? - That may be so, but Mr. Thomas points out that in some Chancery matters there have been orders for the trustee to pay these costs out of the estate.
601. Would your objection to the postal vote still exist if the result had to be unanimous? - I think it is inadvisable because the position really cannot be fully stated in an application to people on a postal vote. You want to be able to have, in my view, a meeting and a discussion of what is involved. It is very difficult for the matter to be set out adequately through the post. I should be against it in any event.
602. Even if unanimity was required? - Yes, because if unanimity is not achieved you seem to be back where you started.
603. Supposing we adopted your suggestion of allowing the Board of Trade to do it, do you not think the same thing would apply, because they would probably circularise the members of the committee of inspection before they gave their sanction, so in effect you might almost say it is a concealed postal vote instead of an open postal vote? - They are taking the responsibility and exercising the control, and one is having the control exercised in that way and not exercised through the post with people who may not understand the full implications. The Board of Trade at least understand all the implications involved.
604. Mr. Emmeragh: Cases frequently arise where you call a meeting of the committee of inspection to discuss the sale of a business and the committee instruct the trustee to try and obtain offers and give him a limit below which the business shall not be sold. If he can then get an offer from one, two, or three people within three or four days it is not worth the time of the committee to call a meeting again. It is very much easier to write round and say: "I have this offer and in accordance with your previous instructions I propose to accept it, do you agree?" It is not a question of having to lay all the facts before the committee; they have already been laid before them. - In that particular class of case, where the matter has already been thrashed out before the committee, maybe the danger is not so great, but it seems to me if you start making exceptions in one case it is very difficult not to accept the principle throughout, and it is far better to have a proper control, as has so often been emphasised by the Courts.
605. Chairman: Another witness has suggested a rather revolutionary proposal that some small remuneration should be paid to members of committees of inspection for attending meetings. He had in mind some figure like one guinea. Although it is rather outside your province would you care to express any view about that? - Well, I do not see any reason why they should not have some expenses. I have not really given the matter any consideration, but I should have thought, with the type of people you get on most of these committees, one guinea would have been neither here nor there. The people you often get are members of large commercial concerns and it is not a question of a few shillings for attending, it is a question of their time being worth so much more for them to do something else. I should not have thought it would help very much.
606. I do not know whether you have ever considered subsection (2) of Section 83 in your time. It seemed to us it was inconsistent with the provisions of Section 82(1) and it ought to come out. Have you any

views about that? - I agree with you entirely. It seems to me that it really cuts no ice in view of the decision in re Wayman ex parte Official Receiver 24 QBD 68.

607. Section 83(8) seems to provide for taxing the bills of all sorts of people other than solicitors. Do you think it is necessary for them to be taxed, as nearly all of them have fixed scales of remuneration, have they not? - I think the only people who have scales of remuneration with whom one deals are such people as auctioneers.

608. And stockbrokers? - They may, yes. But what I feel about this is that you can get people with no professional qualifications and no professional standing who are trustees and who employ other people who have no particular professional standing. That is the type of case where abuse may creep in, and it is for that sort of reason mainly that you want to keep a general check, a general control. In order to do that it seems to me you have got to have control in all cases.

609. Do you ever in fact get bills from people who may have employed, say, a cowman in the case of a bankrupt farmer? - Yes, one does. - (Mr. Thomas): One might get that where an auctioneer is instructed, and through him you might get this farmhand employed to assist the auctioneer; but it would come in the auctioneer's charges.

610. I can understand that, but I cannot imagine a cowman sending in a bill for, say, "Attending Buttercup on her confinement, 10/6d." - (Mr. Adams): I have not seen one. - (Mr. Thomas): It is not impossible. I would say that we have had something like that.

611. Mr. Sherwell: What you are really saying, as far as managers, accountants, brokers, solicitors are concerned, is that someone has to say what is fair and, if the Taxing Master does not, who does because they will not know what the scale is. Is that right? - (Mr. Adams): That is perfectly right, yes.

612. Chairman: I suppose if we leave the subsection as it is, but cutting out the words "not being trustees", which are quite useless, that would be all right in practice, would it not? - Yes.

613. I suppose "other persons" must be construed as being, *ejusdem generis*, managers, auctioneers, accountants, and so on? - The other persons we get are not confined to persons similar to auctioneers etc. During the course of a year we may have private enquiry agents' charges for attempting to trace assets; antique dealers' charges; even expert milliners' charges for distinguishing between ladies' hats which can be sold in lots and valuable models for separate sale; and draughtsmen's charges for preparing bills of costs of bankrupt solicitors.

614. The words "not being trustees" seem unnecessary. - They do not seem to me to carry the matter very far. - (Mr. Thomas): They may have been put in because the trustee's remuneration is already fixed.

615. This is another suggestion made by another witness. Would you be in favour of a trustee being empowered to pay small amounts up to some specified limit - £10 or £20 - without taxation? - (Mr. Adams): I think, if one is going any way in that direction, perhaps one might deal with it in the same way as is done under the Companies Act. Under that Act, where the Official Receiver is the liquidator, he can allow costs and charges of any person other than a solicitor up to five guineas. It would seem to me that a reasonable way of dealing with the matter might be to bring the two Acts in that respect into line, but only so far as, I would say, it is the Official Receiver who is the trustee, and not Tom, Dick or Harry, with all respect to them, who might be trustees. (Mr. Rogers): The Official Receiver does not have to give a bond, whereas Tom, Dick and Harry do.

616. Chairman: In cutting out the taxation of small amounts, we were considering the costs not only of people other than solicitors but even of solicitors. The suggestion was any person employed might

be paid if their charges did not come to more than £10, or whatever figure might be decided. Would you be against that? - Yes, I would, I think, because although it is small, the importance of having sanction and of having taxation has been so emphasised by the Courts. See, for example, the Court of Appeal in re Geiger 1915 1 KB 439 at p. 456, and in re Yeatman 1916 1 KB 786. You are no doubt acquainted with those cases but I do not know whether all the people here are. In the former case it was emphasised, to use the words of the learned Judge, Lord Justice Swinfen Eady:-

"It would be most inexpedient to introduce or sanction any laxity of practice in bankruptcy, or gloss over irregularities and condone them as merely formal defects. This would be to abolish the safeguards which the Acts and rules founded on long bankruptcy experience have set up to promote speedy and economical administration in bankruptcy."

He is far wiser in these matters than I am and I would not like to differ from that in any way.

617. Mr. Lloyd Williams: It seems rather invidious to single out solicitors up to five guineas if you are employing accountants and others, does it not? - I would suggest it would be necessary in all cases. I do suggest that, if there is to be any laxity in the matter, if I may put it that way, it should be brought in line with the Companies Act in order to have uniformity throughout.

618. Is there any reason why solicitors should be singled out in that particular way? - I do not think there is any particular reason why solicitors should be singled out, except for the possible reason I mentioned earlier, but my suggestion is for the sake of uniformity.

619. You could not get very far in a big action with five guineas, could you? - I quite agree.

620. Chairman: Is not the reason for the rather invidious singling out of solicitors that, if a particular solicitor does happen to be a shark, he can take much bigger bites than, say, an auctioneer, because an auctioneer is restricted by his scale of charges? - If his bite is only five guineas perhaps there would not be very much harm done.

621. Mr. Lloyd Williams: I was under the impression that solicitors had some sort of scale. - I do not think you want to be too certain about that. Under the new Schedule II, they have no scale at all.

622. Chairman: Ingenuity can always include items such as "Attending you on the telephone when I informed you that I could not come and dine!" - Yes, hence the Taxing Office. Moreover, under the new Schedule II they do not even have to devise items; they make a gross sum charge.

623. Speaking for myself, I am definitely in agreement with your last suggestion which you made about the Deeds of Arrangement Act, 1914. My own note simply was, "Why not?" - I am afraid I do not claim to be very expert on this subject. If the committee would like to deal with it I will ask Mr. Thomas to speak. - (Chairman): No, I think it is quite clear. It is a simple amendment which would bridge an entirely unnecessary gap.

624. Mr. Lloyd Williams: There is one point you made earlier which I would like to get quite clear. On the question of Rule 106(1), applications as to limit of costs, you suggest the Registrar should be given power to deal with any difficulty? - I think it should be the Court.

625. It is the Court, the Rule says the Court? - Yes.

626. So that would mean the Registrar? - The Registrar for that purpose is the Court, yes.

627. In fact the Registrar would deal with everything unless the action was judged, so the Registrar would deal with that point? - Yes.

628. So he is really given power under the Rules at the moment? - Yes, to deal with the question of limit. My suggestion was he might be able to deal with sanctions in the same way, where there is a difficulty in getting a meeting of the committee of inspection. My suggestion was that the Registrar might in the same way have power to deal with that.

629. That is the second string after the Board of Trade? - Yes, that was the second string after the Board of Trade.

630. Chairman: Would you be prepared to consider ex post facto sanction by the Court, that is where perhaps it is a matter of urgency if the trustee is employing a solicitor? - In cases of urgency and where there has been no undue delay.

631. I gather you want to leave the phrase "undue delay" and not specify a time? - I think so, yes. I think it is much better to have it in that form.

632. Thank you for coming along this afternoon, Mr. Adams and Mr. Thomas.

(The witnesses withdrew)

One general point I should like to make, is upon the question of practice. I think if possible, it would be advisable to give County Court Registrars jurisdiction in questions of discharge instead of the Judge, as this would be usually more convenient. I also think a lot of time and expense is wasted on the present conduct of Public Examinations which often do not seem to me to serve too useful a purpose, and it might be well to cut down if possible, their length, or reserve them for questions by Creditors if any. The matters have already been fully covered by the Official Receiver in his preliminary examinations.

Yours faithfully,

(Sgl.) **CECIL H. COX**
Registrar.

EXAMINATION OF WITNESS

Mr. Cecil Hammond Cox, Bankruptcy Registrar, Birmingham County Court

Called and examined

633. Chairman: The two books in front of you, Mr. Cox, contain the amendments to the Bankruptcy Act and Deeds of Arrangement Act which we have been considering. It may be convenient to you to have these amendments in front of you, but as they are not definitely settled yet, we must ask you kindly to treat them as confidential. - (Mr. Cox): Certainly.

634. Mr. Cox, you are the Bankruptcy Registrar of Birmingham County Court? - That is so.

635. And also District Registrar? - Yes.

636. The first thing we have been asked to consider is the question of discharges, and I think perhaps it would be convenient if for a moment we forgot about existing bankruptcies. You will have had a circular from us in which one scheme was outlined, and we have also had a slightly different scheme under consideration. The difference, speaking very broadly, is this: in the scheme circulated to you, if the Court enters a caveat against a bankrupt on his public examination it fixes a day for hearing his discharge and considers it, much as it does now, and in many cases no doubt refuses it. The refused bankrupt under that scheme then comes under onerous obligations as to reporting his whereabouts, and so on, periodically to the Official Receiver. The other scheme is this: either at the conclusion of the public examination or at any time within, say, two years after it, the Court may enter a caveat against the bankrupt. If it enters a caveat then it is up to the bankrupt to apply for his discharge, as he has to today, and it is the caveated bankrupt and not the refused bankrupt who is under these onerous duties as to reporting, and so on, to the Official Receiver. I wonder if I might ask you which of those two schemes, speaking very broadly, do you think is the better one? - I should prefer the second one.

637. Have you any particular reason for that? - Under the first scheme the caveat must be entered immediately after the public examination. That may not give the Official Receiver, or the Court for that matter, quite enough time to consider carefully exactly what has happened. Moreover, it seems to me that, unless there are certain precautions laid down, it might well be that the caveated bankrupt might be in a better position than the ordinary one. If no caveat is entered then the bankrupt is automatically discharged at the end of two years. But if a caveat is entered then, as I understand the position, a date of hearing the discharge has to be settled when the Court will go into it and discuss what has to be done.

One general point I should like to make, is upon the question of practice. I think if possible, it would be advisable to give County Court Registrars jurisdiction in questions of discharge instead of the Judge, as this would be usually more convenient. I also think a lot of time and expense is wasted on the present conduct of Public Examinations which often do not seem to me to serve too useful a purpose, and it might be well to cut down if possible, their length, or reserve them for questions by Creditors if any. The matters have already been fully covered by the Official Receiver in his preliminary examinations.

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634. Mr. Cox, you are the Bankruptcy Registrar of Birmingham County Court? - That is so.

635. And also District Registrar? - Yes.

636. The first thing we have been asked to consider is the question of discharges, and I think perhaps it would be convenient if for a moment we forgot about existing bankruptcies. You will have had a circular from us in which one scheme was outlined, and we have also had a slightly different scheme under consideration. The difference, speaking very broadly, is this: in the scheme circulated to you, if the Court enters a caveat against a bankrupt on his public examination it fixes a day for hearing his discharge and considers it, much as it does now, and in many cases no doubt refuses it. The refused bankrupt under that scheme then comes under onerous obligations as to reporting his whereabouts, and so on, periodically to the Official Receiver. The other scheme is this: either at the conclusion of the public examination or at any time within, say, two years after it, the Court may enter a caveat against the bankrupt. If it enters a caveat then it is up to the bankrupt to apply for his discharge, as he has to today, and it is the caveated bankrupt and not the refused bankrupt who is under these onerous duties as to reporting, and so on, to the Official Receiver. I wonder if I might ask you which of those two schemes, speaking very broadly, do you think is the better one? - I should prefer the second one.

637. Have you any particular reason for that? - Under the first scheme the caveat must be entered immediately after the public examination. That may not give the Official Receiver, or the Court for that matter, quite enough time to consider carefully exactly what has happened. Moreover, it seems to me that, unless there are certain precautions laid down, it might well be that the caveated bankrupt might be in a better position than the ordinary one. If no caveat is entered then the bankrupt is automatically discharged at the end of two years. But if a caveat is entered then, as I understand the position, a date of hearing the discharge has to be settled when the Court will go into it and discuss what has to be done.

638. That is under the first scheme. - Then, unless some restriction is placed upon the Court, presumably the Court would have power to say: "I will grant this bankrupt his discharge, suspended for three months", or six months, twelve months, or whatever the case may be.
639. Yes. - If so, he might be better off under the caveat than he would be without a caveat, might he not?
640. It might happen under the first scheme. - Whereas it would not happen under the second scheme which you have just outlined.
641. No, it would not. Thank you for that. If we may turn now for a moment to the existing undischarged bankrupts, of whom there are, we are told, about 40,000 in the country, what we thought of was a scheme whereby for a period of, say, two years after the passing of the Act the Official Receiver could apply to the Court for a caveat, and if he did then they would continue undischarged until they applied for and were granted their discharge. Otherwise the general body of undischarged bankrupts would be automatically discharged at the end of that period, say two years. That would not, we thought, apply to the bankrupts who had been bankrupt before, or had not surrendered to the proceedings, or had had their discharges refused. - That scheme seems to me quite good, except that, as I outlined in my letter, it did strike me as to whether the period of two years is not rather short. Personally, I should have thought a period of four or five years would have been better, but that of course is quite a minor detail.
642. Did you see any particular magic in the period of four or five years, when, if it is such a bad case as all that, the Court will presumably enter a caveat? - No, there is no particular magic in it in that respect. The only point is that the average bankrupt is only too anxious to start up again in his own name if he can, and whether you think he is sufficiently penalised by being debarred from that for two years is, of course, a matter for your consideration.
643. I see you say you attach importance to their not trading under their own names, but is it not worse for the commercial world if they trade under somebody else's name? - Does not the commercial world then get some indication that there is something wrong? You see, if a man is trading under his own name, no enquiries need be made at all, nobody is put on his guard and the commercial world would take it as an ordinary transaction, but if Mr. Smith is trading under the name of Mr. Jones, or Mrs. Smith or Mrs. Jones, are you not to some extent put on your guard, and you would say: "Why is this, and why is the man not trading under his own name?"
644. If you know it is not his own name, well and good, but what we were thinking was that if there is a notorious bankrupt called Samuel Snyester, who starts trading under the name of Thomas Trusty, the world at large does not know that Thomas Trusty is not his name? - I quite agree. It probably does not go far enough to catch the complete twister. But it did seem to me to be some safeguard by putting the creditor wise that there is something he ought to enquire about.
645. Of course, if he sees over the shop the words "Matilda Jones", and then he finds Thomas Jones inside the shop, he probably suspects that it is his wife, and then he is put on his guard, I agree. - That is the only thing that was on my mind.
646. Mr. Emerson: There is the Register of Business Names. - How many people comply with the Registration of Business Names Act?
647. Chairman: I think we are all in agreement with you about the second bankruptcy, and about increasing the figure of £50 for the minimum petitioning creditor's debt, and indeed on several of the next following points you deal with. You would like County Court Registrars to deal with discharges in lieu of the County Court Judge. Do you see any reason why the practice should not be assimilated to High Court practice, and the County Court Registrar be given all the powers that

the High Court Registrar has? - I think it would be an extremely good proposition.

648. It seemed to us that, with the increased jurisdiction of the County Court, it would almost have to be done in some busy Courts. - Certainly in the busy Courts it would prove very beneficial to the general working of the Bankruptcy Acts and the general working of the Court.

649. Mr. Lloyd Williams: It is a fact, is it not, that the Registrar knows far more than the Judge about the debtor's conduct? - Certainly that is so.

650. Chairman: It must be so, I think, because after all the Registrar actually hears the public examinations. - Yes.

651. Mr. Lloyd Williams: I was hoping you would support me, Mr. Cox: - I do strongly support you.

652. Chairman: What would you propose about public examinations? I see you think they could be cut down, but is not that a matter rather of practice than of legislation? - I suppose it is, but it does strike me that in the majority of cases it is a very large and useless expense. Put it this way: the general practice throughout the country is, I think, that the Official Receiver goes through the whole of the debtor's history so as to get it down in the notes, which means that a shorthand writer has to be there to take it all down. Does that serve any useful purpose? I should have thought if the Official Receiver presented his report, the debtor asked if he had any comments to make upon it, and then any creditor present - which we very rarely get - is entitled to ask any questions, that would probably have covered all that is necessary.

653. Do you not think the very publicity of the public examination is its essence? - Do you think it troubles the debtor very much? -

(Chairman): It would trouble some debtors, I fancy.

654. Mr. Lloyd Williams: Is it not essential to get out of the public examination the conduct of the debtor, which may subsequently lead to a prosecution? - Yes, I think it is, but my only point was whether it would be better for that to be brought out by the Official Receiver in his report than by questioning at the public examination. I do not think there is much in it, though.

655. Chairman: You say you do not have very much to do with deeds of arrangement, but do you ever have experience of bankruptcy petitions founded on deeds of arrangement which are really presented with the object of extorting some advantage from the debtor's failure, getting some advantage that the creditor is not entitled to anyhow? - I should say very few. You see, what really happens - I am talking particularly now of Birmingham - is that if the debtor has any substantial assets he is dealt with through his trade association. The trade associations go down to him and say: "You had better call your creditors together and let us deal with it", and they do, so that we do not see anything of it. If it is a really bad case, or the debtor has got no assets at all, then of course it is thrown into bankruptcy.

656. Do you think it would be a good idea to give the Court power to dismiss a bankruptcy petition if its object was to extort? - The difficulty I think you will get there is, how are you going to decide whether the purpose of the petition is to extort money?

657. It is very difficult, I know, but suppose it was proved to the satisfaction of the Court that such was the case? - Then I think it would be advisable to give the Court power to dismiss the petition.

658. Supposing the Court were given power to dismiss petitions founded on deeds of arrangement, on the ground that a receiving order was not in the interest of the general body of creditors, do you think that would be a good idea or not? - No, I think any creditor for the requisite

amount should be entitled to say: "This matter should be wound up by the Court and should be gone into by the Court". You see, a creditor may be opposed to a certain trade association winding the debtor up, and I think he should have the option, if he so desires, of the debtor's estate being officially wound up by the Court.

659. Mr. Emerson: I never heard of a trade association acting as trustees under a deed; has that happened? - The nominee of the trade association often does. When I talk about the trade association, I do not mean the association as such, but the accountant or the secretary to the trade association who is often nominated under the deed. He winds it up, and accounts more or less to the trade association for his actions.

(Mr. Peirce): That is a new one on me.

660. Mr. Emerson: I should have thought he would have accounted to the creditors. - The creditors are so often the trade association.

661. Mr. Peirce: The members of the trade association? - Yes, the members of the trade association, I beg your pardon. - (Mr. Peirce): It is more understandable now.

662. Chairman: We were thinking of cutting down the time for petitions founded on a deed of arrangement to one month in all cases. Do you think that is a good idea? - I think it would be a good idea, yes.

663. Talking of time, do you think that the time for compliance with a bankruptcy notice is adequate? - On that, I was going to put the suggestion forward whether it would not be worth while having a further act of bankruptcy for non-compliance with a judgment debt, so that it gives the creditor if he likes the option of doing away with the service of the bankruptcy notice entirely.

664. Within what time would you suggest? - I think the present time. The present time is seven days which is adequate.

665. Would you have it an act of bankruptcy not to satisfy a judgment debt within seven days? - I think so, or some longer period if you think otherwise. After all, the debtor knows he has got this liability over him, and if he does not make some arrangement in the seven days - or fourteen days, if you like, whatever you think - is there much object in serving him with a bankruptcy notice?

666. It would deprive him, would it not, of the right which he has under the existing law of filing an affidavit that he has got a counter-claim or set-off that he could not have set up in the action in which judgment was obtained? How would that apply to your view? - He could do it on the petition.

667. Yes, he could, that is true. Supposing we do decide to preserve the machinery of the bankruptcy notice, do you think the time of filing an affidavit of counter-claim or set-off is adequate? I think it is only four days. - Of course, that is nowadays a very short time. I would suggest he should have fourteen days.

668. Fourteen days for the compliance with the notice, and, say, seven days for filing the affidavit? - Yes. Nowadays, you see, four days is extremely short. By the time he gets it, and by the time he has obtained legal advice, and so on, the four days have gone completely.

669. He may be served with a bankruptcy notice late on a Friday afternoon? - Quite, and then he has got no time whatever.

670. There was one other thing I wanted to ask you about. Do you think that the doctrine of reputed ownership serves any useful purpose in this day and age? - I do not think it does.

671. Then it might just as well come out of the Act, might it not? - I should say there is not much object in retaining it.

672. Perhaps you would like to give us your views on one other matter.

We thought of recommending that the Sections relating to distress and execution should be brought into line and simplified by providing that if the creditor or the sheriff can hold what they have got for 21 days without notice of a petition, then they are home, but if notice of petition is served then the creditor has got to cough up. What do you think about that? - I think that is a very good provision.

673. We are very much obliged to you, Mr. Cox, for your help.

(The witness withdrew)

Wednesday, 9th May, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. N.B. SHEWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

MEMORANDUM SUBMITTED BY THE NATIONAL CHAMBER OF TRADE

The National Chamber of Trade was pleased to be invited to submit its views to this Committee, and now that it is doing so would first of all wish to remind the members that it was formed in 1897 and is now regarded as the premier co-ordinating organization for the retail distributive trades in the British Isles. Its membership comprises 860 local affiliated Chambers of Trade and Commerce and Traders Associations, 1,250 individual members and the following thirty-four specific national trade associations:-

The National Association of Cycle Traders.
 The Stationers' Association of Great Britain and Ireland.
 The Music Trades Association.
 The National Association of Outfitters.
 The National Union of Retail Tobacconists.
 The National Federation of Retail Newsagents.
 The National Federation of Sub Postmasters.
 The Wallpaper and Paint Retailers' Association of Great Britain.
 The Booksellers' Association of Great Britain and Ireland.
 The Relay Services Association of Great Britain and Ireland.
 National Federation of Master Bakers, Confectioners and Caterers.
 National Shoe Retailers Council.
 Electrical Contractors' Association.
 The National Federation of Saddlers and Leather Goods Retailers.
 The National Association of Funeral Directors.
 The National Federation of Fish Priers.
 The National Hairdressers' Federation.
 The Retail Fruit Trades Federation.
 The National Federation of Ironmongers.
 The National Union of Retail Confectioners.
 The National Pharmaceutical Union.
 The Association of Certified and Corporate Accountants.
 The Caterers' Association of Great Britain.
 The National Federation of Credit Traders.
 The National Market Traders Federation.
 The National Association of Goldsmiths of Great Britain.
 The Federation of Sports Goods Distributors.
 The National Children's Wear Association.
 The British Poster Advertising Association.
 The National Pawnbrokers' Association.
 The Incorporated Guild of Hairdressers, Wigmakers and Perfumers.
 The Radio and Television Retailers' Association.
 The National Federation of Retail Newsagents, Booksellers and Stationers.
 The National Association of Retail Furnishers.

The following memorandum was prepared as the result of the opinions expressed by many of the above organizations, after the problem had been considered in one or more of the following ways:-

(a) By the Secretaries themselves, who in a number of instances are either accountants or solicitors:

(b) by special sub-committees composed in a good many cases of professional gentlemen interested in the points at issue in their day-to-day duties: and

(c) by the opinions of members expressed at meetings when the subject was under discussion.

Replying to the questions in the order in which they were set, we wish to say:-

(1) "Whether, and if so how, the Bankruptcy Acts should be amended in regard to the discharge of bankrupts. Comments on the scheme outlined in the Appendix to this letter would be particularly appreciated."

Comments here were varied, but might fairly be summarised as indicating that:-

(i) Bankruptcies, whether under the Official Receiver or under a Trustee, take far too long to administer and the proposed new Act should give additional powers to the Official Receiver or Trustee to enable the administration to be carried out with greater speed.

(ii) No necessity for amending the Bankruptcy Acts in regard to the discharge of bankrupts excepting where a bankrupt has paid his creditors in full. It is thought that the necessity for a bankrupt to disclose his bankruptcy before obtaining credit for more than £10 is a valuable deterrent which should be preserved. Provision for the automatic discharge of a bankrupt should be made for debtors who discharge their debts in full.

(iii) If the proposed scheme of automatic discharge is proceeded with, some provision should be made so that a caveat shall be automatically lodged by the Court if on public examination the bankrupt is found to have made a practice of obtaining credit beyond the reasonable needs of his business, or some other scheme should be devised to prevent such men obtaining an easy discharge and returning to their old habits.

(iv) The results of greater latitude might be that unsuccessful traders would be inclined to take refuge in bankruptcy far too easily, with correspondingly detrimental results to those traders who manage their business in such a way as to keep it on a successful and prosperous keel.

(v) There is no weight of evidence that the provisions of these Acts are working unsatisfactorily or unfairly whether as regard bankrupts or their creditors. Bankruptcy must be considered most carefully in-as-much as it provides a method whereby an unsuccessful trader can lawfully escape from the payment of a proportion (sometimes a large proportion) of his just debts and, although there are a number of cases of bankruptcy through no fault of the bankrupt, yet there are a majority of bankruptcies which have only been caused by the extravagance and folly of the insolvent trader.

(2) "In relation to a second or subsequent bankruptcy where the bankrupt remains undischarged from a previous bankruptcy, whether assets acquired by the bankrupt after his previous bankruptcy should be applied in discharging the debts owing to creditors in the second or subsequent bankruptcy in priority to any debts remaining owing in the prior bankruptcy."

On this question opinions were almost evenly divided; there was, however, a slight bias in favour of assets acquired by the bankrupt after the previous bankruptcy being applied in discharging the debts owing to creditors in the subsequent bankruptcy.

The Trustee and creditors in the first bankruptcy will know more about the position of the bankrupt and it should be their responsibility to control the activities of the bankrupt. If they are sufficiently indifferent to their own claims and the activities of the bankrupt as to permit his engaging in trade and suffering a subsequent bankruptcy, the earlier creditors should not have the same rights as subsequent creditors who had accepted the bankrupt as having full mercantile status.

- (3) "The desirability of increasing the monetary limits prescribed by the Bankruptcy Acts so as to take account of the fall in the value of money, particularly those relating to a petitioning creditor's debt and to the estimated value of assets to enable an Order for Summary Administration to be obtained from the Court."

The replies to this question showed a majority in favour of increasing the monetary limits.

- (4) "The advisability of limiting the vesting of after acquired property to such property as may be claimed by the trustees."

The opinions expressed showed a substantial majority against the adoption of the change envisaged in this question.

- (5) "Whether creditors should be able to appoint the Official Receiver as Trustee in a non summary case."

The opinions received in reply to this question showed a two to one majority in support; the reasons against, however, are very sound and may be summarized by stating that the Official Receiver's duties are primarily concerned with questions of the debtor's conduct and of criminal proceedings, and are not hampered in any way by the fact that a Trustee is realizing the assets. There is full co-operation between the Official Receiver and the Trustee which meets the need. Both the Board of Trade and the Official Receivers may well be opposed to the proposal.

- (6) "Whether provision should be made for a conclusion of the bankruptcy where the debts are paid in full (with statutory interest) and a re-vesting of the surplus in the bankrupt without the necessity for any documentary transfer by the trustee."

The replies to this question were two to one in favour of its adoption. As in the previous case, however, certain reservations were made which would to a large degree depend upon what comprised the surplus in the hands of the Trustee. If the Trustee happened to be holding any assets, part of which were realised to pay the debts in full, the remaining part might be required by law to have documentary evidence in order that it could be returned to the bankrupt, for it must be remembered that whatever comes under the hand of the Trustee is vested in him. It would not be wise to disturb the existing law regarding the transfer of land and other items which can only be conveyed by writing, but in the case of other articles such as money, there should be no need for any documentary release.

- (7) "The enlargement of the provisions of Section 51 of the Bankruptcy Act, 1914 to cover all kinds of earnings including the wages of workmen."

There was unanimous support for this suggestion.

- (8) "An amendment whereby all prosecutions for offences under the Bankruptcy Acts may be instituted and carried on by the Board of Trade in lieu of the Director of Public Prosecutions."

The majority of opinions expressed were in favour of this amendment being made operative, although opposition to the suggestion was voiced on the grounds that prosecutions for offences under the Bankruptcy Acts are usually full of intricacy and for that reason there are not a great number of them. As the various matters which have to be proved to establish

this type of offence are such as require detailed investigation by persons experienced in criminal prosecutions, it is better that such prosecutions should be still the responsibility of the Director of Public Prosecutions, although it is appreciated that the Board of Trade would have its own legal staff who would be mainly concerned with non-criminal matters.

(9) "With regard to the Deeds of Arrangement, what provisions are desirable in order that there may be a more effective control by the Board of Trade over the administration of assets vested in a trustee under a Deed of Arrangement."

On this issue, opinions were so evenly divided that no conclusion can be drawn.

In connection with the Scheme submitted for the consideration of the Committee, the replies received indicate a three to two majority against (a), but support for (b), (c) and (d). In connection with (e) -

"Provision would be made for the automatic discharge of all existing undischarged bankrupts provided they had not been bankrupt on more than one occasion and the Court had not refused their discharge."

- opinions were fairly evenly divided but with a slight majority in favour of the proposal.

General Suggestions

A number of general suggestions are submitted to the Committee for consideration:-

(A) The preferential position of the Inland Revenue should be cancelled and the Revenue should take its place (unless it happens to have some security) with ordinary unsecured Creditors.

(B) A male bankrupt's Estate should not be entitled to receive any tax refunds which are attributable to the wife's income (whether or not the wife has been separately assessed).

(C) Traders should be given, say, three years' notice of the minimum standard of book-keeping which they should observe, and when the standard of book-keeping of a bankrupt Debtor is considered to be grossly defective, he should be suitably penalised.

(D) The Act should be amended to provide that a Trustee could claim the return of either the original property or the value thereof in relation to any fraudulent conveyance, gift, delivery or transfer made within the period of six years immediately preceding the date of the Act of Bankruptcy.

(E) Sums set aside for the payment of General Rates due to a Local Authority in the United Kingdom should be capable of being used as a debt to found a Petition in Bankruptcy.

(F) Income Tax - It sometimes occurs that a person becomes bankrupt and subsequently, having obtained his discharge, builds up a further business and then honours his moral obligations by repaying those creditors who were not paid in full as a result of the bankruptcy. When this happens the payment of these old creditors is not allowed to the debtor as a deduction from profits for income tax purposes. Thus a repayment must be made out of taxed income. This has led to further difficulties on the part of the ex-bankrupt and it is felt that, where a person is sufficiently honourable to take this step, some recognition of this should be given by the Inland Revenue and some allowance made against current profits.

(G) At the present time the Trustee's accounts are subject to six-monthly audit by the Board of Trade. At the conclusion of Bankruptcy the Trustee applies for his release and then a formidable set of questions is addressed to him; these include such matters as how has he dealt with leases and other possible onerous property. These questions, if necessary at all, would be better addressed to the Trustee during the course of the administration of the Bankruptcy, e.g. at the time of the six-monthly audits. Some bankruptcies are very protracted affairs and go on many years, and it is most unfair that the Trustee should be faced with these questions at the conclusion of his task. The Board of Trade should be prohibited from adopting this procedure and release should be automatic at the conclusion of the administration.

(H) In connection with proofs of creditors, it appears to be needless for a creditor to be put to the trouble and expense of buying a 1s. 6d. bankruptcy stamp and also paying an affidavit fee in respect of a claim for over £2. With regard to the affidavit fee, it is suggested that it might be sufficient if the Official Receiver or Trustee could require, if considered necessary, proof to be sworn.

(I) The Bankruptcy Rules and procedure are too rigid and do not give sufficient discretion or latitude to the Trustee. The remedy would probably be to bring them more into line with those applicable to the voluntary winding-up of companies, which are more modern and practical.

(J) The Official Receiver and Trustees should have more freedom in committing themselves to the payment of small fees and expenses on their own responsibility, especially for the purpose of obtaining information and employing the services of professional people where the amounts involved are small. The insistence on taxation of costs for the smallest imaginable bills serves no other purpose than to hamper the work of the trustees.

(K) It appears that Official Receivers are particularly handicapped by having no fund at their disposal to meet initial expenses and such a fund should be provided from public sources subject to repayment out of the assets collected.

(L) Public Examination is fixed at the time of notification to creditors of the first meeting. It should be convened or appointed, as the case may be, at the discretion of the Official Receiver after he has examined the statement of affairs and the information supplied to him by the bankrupt. The Public Examination could be sent down for hearing upon the Official Receiver giving notice of not less than 14 days of the date of any such examination.

(M) The "Reputed Ownership" and "Order and Disposition" provisions of the Bankruptcy Acts are quite unrealistic having regard to modern tendency to acquire property on credit generally, in particular by hire purchase.

EXAMINATION OF WITNESSES

Mr. Carlton William Docking	}	Representing the National Chamber of Trade
Mr. Stanley Davenport Hull, A.C.A.		
Mr. Joseph Walter Stevenson, F.C.C.S.		

Called and examined

674. Chairman: Good afternoon, Gentlemen. Since we were appointed, we have been right through the Acts and have made certain provisional amendments to them, which are before you in the two books which have been

produced. It might help you to refer to them. Naturally they are not definitely decided on yet because we have to hear what all the witnesses have to say, so I must ask you to treat them as confidential at present. - (Mr. Stevenson): Yes.

675. We notice from your memorandum that you represent an enormous number of different interests. I am afraid you must have had awful trouble in collating the views of so many and such varied persons and making the whole into a coherent statement. - That was one of the difficulties - a great difficulty. But, as set out in the preamble, although the representations are wide, an attempt was made by the various local Chambers to bring expert opinion to bear in the discussion of the problems.

676. The first thing we have been particularly asked to advise about, as you know, is the problem of discharges, and we thought that that fell into two parts - namely, the problem of discharge in future bankruptcies and the problem of the existing undischarged bankrupts. If we might just for the moment forget the existing bankruptcies, we have had before us a scheme which is a modification of the scheme which was circulated to you. The difference between the two schemes, putting it very broadly, is this. Under the scheme which has been circulated to you, and on which we have your comments, every bankrupt would have a date for the consideration of his discharge fixed by the Court, possibly a long time in advance, at the conclusion of his public examination. The Court would then consider his discharge, and if it refused it he would be under onerous duties as to reporting from time to time to the Official Receiver, and so on. Now, the amended scheme would work in a slightly different manner. The Court could enter a caveat, either at the conclusion of the public examination, or, on application, within a period of we thought two years after it. If it entered a caveat, then the bankrupt would have to apply for his discharge in the way he does now and he would be under those onerous duties of reporting himself to the Official Receiver from the time the caveat was entered, but if no caveat was entered then he would be automatically discharged after a lapse of two years. Those, broadly speaking, are the two schemes we have before us, and I should be very interested to know which one you think is the better. - (Mr. Docking): Who would have the right to enter the caveat? You mentioned the Court, I think.

677. The Court enters it. - Only the Court?

678. Only the Court. - On whose application?

679. On the application of the Official Receiver or the trustee or a creditor at the public examination, and during the two years on the application of the Official Receiver or possibly the Official Receiver and the trustee - we have not quite decided about that yet. - The two schemes do not differ very much from one another, do they?

680. The chief difference is that in the one case every caveated bankrupt has his discharge considered by the Court automatically, and in the other case the caveated bankrupt has to apply for his discharge. In the first case it is only the refused bankrupt who has to keep the Official Receiver informed of what he is up to, and in the second case every caveated bankrupt has to do so. I do not know how you view the two schemes generally? - (Mr. Hull): I think the answer to that from this side would be this. The Chamber, in its correspondence with the members, has been rather impressed with a desire to keep strict control of the bankrupt, possibly for his own good. But, in any case, if the bankrupt had to make application, it would be better having the caveat entered and then not making him report from time to time. If, at the public examination, no caveat is entered but one is entered later, it seems to me that he ought to make application and have the whole matter examined before he gets his release.

681. That is what I thought you would say, because it is quite clear, I think, that a much stricter control of bankrupts as a whole would be exercised under the new scheme than under the original scheme, which I imagine would recommend itself to you? - Yes. I may say that when I

first approached this question I was under the impression that the purpose of the bankruptcy procedure was to relieve the debtor, but by conversation and discussion with the various traders I have come into contact with I find they have the reverse opinion and they are all anxious to protect the creditor.

682. I suppose the answer to that is that they are intended to relieve the honest debtor and to penalise the dishonest one? - Yes.

683. I know it is a very awkward question to lump at you like this, but may I take it that, on the whole, you think probably the latter scheme is preferable to the original scheme? - (Mr. Docking): I think so. It carries out more thoroughly the scheme that was originally placed before us.

684. In connection with the scheme which has been circulated to you, I see from page 4 of your memorandum that there was a 3 to 2 majority against clause (a), but support for the next three. I do not quite know how that came about, because the next three are all dependent on the first? - (Mr. Stevenson): The difficulty here was to summarise and whilst there was, as stated, a 3 to 2 majority against clause (a), it was considered - and this opinion was freely expressed - that if (a) had to be, then (b), (c) and (d) were almost certainly desirable.

685. If we might now turn to the question of the existing undischarged bankrupts, of whom you may be surprised to know that there are about forty thousand drifting about this country at the moment - rather a staggering figure - what we thought of providing was this. First of all, there should be no automatic discharge for an existing bankrupt whose discharge has been refused by the Court, or who has been bankrupt on a previous occasion, or who has failed to surrender to proceedings, or who has had his public examination adjourned sine die. We felt that we could be fairly certain that all those bankrupts were pretty bad hats. Secondly, we thought of providing that other bankrupts should be automatically discharged two years after the Act comes into force, unless a caveat has been entered within that time. If a caveat is entered within that time they would be in the same position as other caveated bankrupts. Do you think that would be a reasonable solution of this problem? - (Mr. Hull): I should think so. My mind is running to one of my Stockport traders who, in the bottom slump of 1925 to 1927, was made bankrupt. Like a large number of honest traders, he has since cleared his debts privately, but he dare not at this stage - having rebuilt the business and having his sons in the business - he dare not apply to the local Court for release without endangering the goodwill and the prosperity of the firm that his sons are now engaged in.

686. Our provision would cover that, of course. - Your provision would release him, yes. In the case of the honest bankrupt, it would be desirable.

687. You say that the man you have in mind has paid in full? - Yes, possibly without the knowledge of the Official Receiver. I understand there are a fair number like that. Quite frequently, without too much publicity, a reimbursement is made, even to the extent of interest, and in this case interest has been paid at four per cent.

688. As he has done it all privately, I suppose that is one of the reasons he would have difficulty in applying for an annulment? - No, the only reason for his not applying is the publicity which would affect him. It has taken him twenty years to rebuild the business. - (Chairman): That is the very sort of case in which one wants to provide for an automatic discharge.

689. I see that on page 2 of your memorandum you put in a warning against allowing greater latitude. I think that may have been put in under a misapprehension because I do not think that either of the proposed schemes about discharges are going to allow greater latitude to bankrupts, are they? - I think the idea there was that if one could stave off the dire perils for two years and then be released automatically, the scheme might have a tendency to encourage bankruptcies.

690. But then do you not think that the threat of a caveat hanging over a man who is going to go bankrupt would be effective? - I was thinking more of the general public's attitude, because if it gets noised abroad that if a man is made bankrupt after two years he is automatically released, that is the short-circuit interpretation they would place on it - there may be less appreciation of the responsibilities and dangers of committing acts of bankruptcy.

691. When you put that in your memorandum did you realize the proportion of bankrupts at the moment whose discharge is suspended for more than two years? - (Mr. Stevenson): That is a figure which I personally was not aware of, and in none of the submissions was there any mention or any implication at all about that aspect of it.

692. I thought probably you had not considered that figure. I understand that only about 1 bankrupt in 5 at the moment applies for his discharge and has it suspended for more than two years. I do not know if that alters your view at all? - (Mr. Hull): I have been looking at particularly the certificate of misfortune, and I think it would be rather a difficult certificate to obtain.

693. Your first comment on page 2, is that you think bankruptcies take too long to administer. Can you make any specific proposal as to how you would speed things up by legislation? - (Mr. Stevenson): No, that is one of the questions where there seemed to be a weight of opinion without a particular reason. Some of the answers have gone into detailed factual explanation, but in this one there was a fairly heavy consensus of opinion with no great amount of reasoning attached.

694. Your wording is "additional powers should be given to the Official Receiver or trustee". I do not know if any of your members have suggested any specific power or powers that would help? - No. I think here, with great respect, a good many of my members have looked at this from the point of view of the trader rather than from the point of view of an administrator - and it does make a difference in the approach to the question.

695. What I personally felt, on reading your memorandum, is that you can quite effectively try to slow things up by legislation, such as motor cars and other things, but when you try to speed them up - well, a minimum speed limit for motor traffic might be a very disastrous thing on the roads. - I quite agree with that. There is a feeling in the letters we received that the whole procedure takes too long, but it is not supported by any detailed explanation or any facts. What I think is in the minds of many of the small traders is the summary case in which it seems to take a long time before they get any dividend. That is probably the point in their minds. I think we have got to put it into its proper perspective and have due regard, very largely, to the quarters from which it came.

696. Your members, I see, were slightly in favour of the assets in a second bankruptcy being applied in discharging the debts in that bankruptcy before they were available to creditors in the first bankruptcy. I do not know what your own personal views about that are? - (Mr. Docking): I think that, as it says in the memorandum, it is up to the creditors in the first bankruptcy to look after their bankrupt. They have had their opportunity, and if there is another bankruptcy - well, the new creditors should have the benefit of the assets, with which in some ways they have been very much associated - they may have furnished very many of those assets. I think it is fairer that they should help themselves first rather than that these probably entirely unsuspected creditors should come along and probably grab all there is.

697. One witness made to us a rather interesting suggestion, that if after a second bankruptcy the bankrupt gets what has been called, perhaps not very happily, a windfall, say a legacy from a deceased aunt or something of that sort, which has nothing to do with the fact that the creditors in the second bankruptcy have given credit, that windfall should

be equally divisible amongst both sets of creditors. It is a complication. I do not know what views you have about that? - (Mr. Hull): The division would be most difficult. I happen to be one of a minority on this question. My Council took the view that the creditors in the first bankruptcy should be entitled to prove in the second, partly on the grounds that the man had been relieved of his debts in the first bankruptcy, and that he had gained his experience in trade at the expense of the creditors in the first bankruptcy. Having gained experience and having gained contacts he then starts in business again and fails a second time. Consequently both sets of creditors were equally entitled to receive a share of what he then has. After all, the trustee of the first bankruptcy would only be proving for the unpaid debt owing to the creditors in that bankruptcy. They would only get a small dividend of the debts owing in the first bankruptcy.

698. In other words, your own people were in the minority? - Yes.

699. And would be in favour of leaving the present system substantially unchanged? - Yes. But that is one Chamber out of a large number. That is not a personal view. That is my own Council's view.

700. Mr. Docking, you are with the majority? - (Mr. Docking): I am with the majority. There is just one other point. Creditors in the first bankruptcy, have usually, long before the second bankruptcy, abandoned any hope of ever seeing anything further from the bankruptcy. It is quite a windfall if they do get something and I think that the later creditors should be satisfied first, even though it does come from a windfall.

701. As regards the monetary limits, your people, on the whole, are in favour of putting them up in principle? - (Mr. Stevenson): Yes, very definitely.

702. Some of them are quite ridiculous, of course, having regard to the present day value of money. What about the petitioning creditor's debt? It is fifty pounds at the moment. Would you be in favour of increasing that, or not? - (Mr. Docking): Yes. We have conferred and we think that a suitable increase would be to one hundred pounds.

703. It is not actually keeping pace with the fall in the value of money? - Not quite, but we felt that it is useful to be able to have the threat of bankruptcy over a man and to be able to serve a bankruptcy petition at one hundred pounds. Certainly it should not be necessary to have a debt of more than one hundred pounds before one could do it.

704. Would you like to suggest a figure as regards what property the bankrupt can move without being arrested? - (Mr. Stevenson): The point was not specifically raised in any of the replies we had.

705. Perhaps I could help you about that. This figure links up with the property he is allowed to keep, such as bedding, clothing and tools of his trade under Section 38. There the limit at the moment is twenty pounds, which is quite ridiculous. We thought that the two figures should correspond, that possibly we might put them each up to fifty pounds. - There is no comment in any of the submissions.

706. Would you be in favour of raising the ceiling for summary cases? It is three hundred pounds at the moment. - (Mr. Docking): Yes; we had in mind five or six hundred pounds.

707. To save going through all the monetary limits, very broadly speaking would you suggest that, if it is desirable to alter any one of them at all, it should be at least doubled? - Yes, certainly. - (Mr. Hull): Yes. - (Mr. Stevenson): Yes.

708. We were rather surprised to see that a substantial majority of your members were against changing the law about the vesting of after acquired property. We wondered whether you thought that they had really understood what the point was. - (Mr. Docking): We felt that it was a safe provision for all property which a bankrupt acquires to vest in the

trustee. The trustee can intervene at any time, of course. I think I am right in saying that if the bankrupt acquires property and disposes of it for a fair consideration before the intervention of the trustee, there is a good title. If the property vests in the trustee he can immediately descend upon it. His title is good. There is no question of getting it vested in him.

709. But, if it is something which he does not want, the unfortunate trustee may be saddled with a white elephant and to get rid of it he has to go to all the trouble and expense of disclaiming it? - He has not got to unless he intervenes. I would submit that that has not been a practical difficulty in the past. This question of vesting has worked very well in the past.

710. There have been hard cases in connection with after acquired leaseholds. - He can always disclaim them.

711. But it puts him to some trouble and expense. - There are other cases where it has been very much to his benefit. People have perhaps searched and have found there is a bankruptcy registration and have gone to the trustee in bankruptcy and pointed out that this property is available.

712. We have provisionally provided that the bankrupt should be under a duty to disclose all after acquired property. That is certainly important and would help? - Yes, of course.

713. The trouble is, as you probably realise, that some of the trustees feel that they have been put in a very awkward position by the decision of the Court of Appeal some little time ago in the case of *re Pascoe*, and a lot of the trustees feel they would rather see that decision altered by legislation so that they are not automatically saddled with the stuff that they want to disclaim and also that they have a right to disclaim, which may be in doubt. - Those are the views which have been expressed by the Chambers; they are not, of course, expressed from the angle of the trustee or the Official Receiver.

714. We have to get his point of view and the trustee's point of view. - Prudence suggests that the Official Receiver or the trustee should have everything he can have and then get rid of it if he does not want it all.

715. I see that there is a 2 to 1 majority in support of the proposal that the Official Receiver could be appointed as a trustee in a non-summary case, but you think that the Board of Trade and the Official Receivers may not like that. Why do you think that they will not like it, because we have not found any opposition from them yet? We, on the whole, thought that it was a good idea, and they seemed quite agreeable. - (Mr. Stevenson): I think there is general support, as expressed by the 2 to 1 majority, but there is a feeling of caution - that it should not be made obligatory. The Official Receiver should have the right, if it was a sound case, but the case should not be foisted upon him. He should not be compelled to take it.

716. You mean that he could say in any particular case: "I do not care what you want. I am not touching this case. You must appoint your own trustee"? - Subject to supporting his refusal, yes.

717. We have not found any such objections from the Board of Trade as you apprehend. Perhaps that knowledge might ease your mind a little? - It certainly would. If the Board of Trade would not object, we would be in favour of their taking on non-summary cases.

718. I think the easiest way of dealing with the next question would be to ask if you would be good enough to look at our revision of Section 69 in the book in front of you. If you will just take your time and read it through and tell us if you think it meets the case of a debtor who has paid in full and there is a surplus resulting. - (Mr. Docking): In

approving this proposal in our report we did reserve the question of leasehold land. I presume that if the suggestion envisaged in Section 69(1), namely that the surplus shall pass to and revest in the bankrupt without any conveyance or assignment, were carried through, the title to the property would be evidenced by a certificate of discharge issued by the Court, and that would be the item of the title.

719. Yes. - Personally, I cannot think of any case where that should not be sufficient evidence of title. I do not think we have any further observations to make on that Section. I do not say that we have digested by any means sub-sections (2), (3), (4) and (5) very thoroughly.

720. You could not, of course, in the time available, but on the glance you have had you do not see any objection to it? - No. We thought the important one was the first sub-section and we have not considered the others very thoroughly, of course.

721. We thought that possibly some of your members might have been under a misapprehension in regard to No. (8) on page 4 of your memorandum because, as far as we understood it, the Board of Trade has a legal staff not only expert in civil matters but they have a number of members on their staff who are really specialists in these particular classes of criminal offence. I take it that if we are right in that, your members would have no objection to the transfer of the prosecutions in general from the Director to the Board of Trade? - My own Chamber were just not interested, and I think that is the majority feeling. It is very much an inter-departmental matter.

722. It is not really a matter which affects you very much? - We are not in a position to express any opinion of any use to you. My Chamber refused to consider it. - (Mr. Stevenson): May I say that we had only seventeen replies to that particular question altogether?

723. We are not surprised to notice that you think that the preferential position of the Inland Revenue should be cancelled altogether. Supposing that we were to recommend that and the Government, or Parliament, would not have it; do you think it would help if the Revenue were reduced to the last year and not to a selected year for purposes of preference? - (Mr. Hull): I usually find that the Inland Revenue claim is based on an estimate which is a half-guess by the Inspector because the bankrupt has invariably failed to keep proper books or present proper accounts.

724. So it is based on one of those estimates which, in turn, proceed on the basis of thinking of a number and doubling it? - Yes. Then they claim a prior position in the bankruptcy, to the detriment of other creditors.

725. At the moment they can claim priority for any year they choose - and they naturally choose the best year? - They always do.

726. Supposing we cannot get their preferential position abolished altogether; would it help, do you think, if they were made to take the last completed tax year before the receiving order - which in most cases is a pretty thin one for them because the bankrupt does not make much profit in his last year? - I would like to send them the trustee's statement and ask them to work out the precise amount of tax due in view of the figures submitted; that would clear away a large number of claims. But from a practical viewpoint, I think that it would be better to have the last year because very often in those cases where an honest man goes bankrupt because he has over-bought in stock or trade has varied and he is incapable of meeting out of cash and other liquid assets his current debts, if the Inland Revenue took the last year they would find that they were taking a year of small profits, which would be a true return of the business as against the higher profits of previous years. - (Mr. Docking): As regards (a), is there any reason why, if we are going to endeavour to bring the Inland Revenue into line with the ordinary creditor, we should not do the same with the local authority?

727. We saw none at all. We thought that they should be on the same level. - That was my view.
728. I personally was very interested in your suggestion under (b) to see that you were proposing - and it struck me as a very important point - that the estate should not be entitled to tax refunds attributable to the bankrupt's spouse's income. I think I am right in saying that the only reason why the reverse is the case at present is that it was so decided by Mr. Registrar Miller some years ago in a case where I appeared for the bankrupt's wife, and the money involved was such that it just was not worth appealing. I always have thought it was wrong. Would it meet the case, do you think, if we included on that part of Section 38, which provides that the divisible property shall not comprise certain things, the words "Any refunds of tax attributable to the income of the bankrupt's husband or wife". Do you think that would meet the case? - That is a very difficult question.
729. I know. Of course, the husband is liable to the Inland Revenue to tax on his wife's income, but I have always thought that that is merely a part of the machinery of tax collection. It does not mean that any refund belongs in equity to the husband. It has always seemed to me wrong that the trustee should be able to claim money which has been overpaid by the wife because it is taxed at source, get it back and then not hand it over to the wife at all but distribute it to the husband's creditors. Of course, if the wife is bankrupt it applies equally the other way round - except, of course, that she is not liable for tax on the husband's income. However, you think we could meet the case by suitable amendment to Section 38, do you? - Yes.
730. As regards your remarks about book-keeping, do you not think that Section 158(3) of the Bankruptcy Act, 1914, as amended by Section 7 of Bankruptcy Act, 1926, covers that point? - (Mr. Hull): I think the real difficulty is usually the bad bankrupt who has failed to keep any books at all. The attitude that the Chamber adopted was, could there not be a code of conduct with a specified list of books which are essential and which shall be kept? We have a precedent under the Companies Act as to what are the books which shall be maintained. Could not the same thing be incorporated in the Bankruptcy Act and perhaps publicised?
731. Mr. Lloyd Williams: Is it not more a matter for the trade association to advise them as to which books they should keep? - I think they would take far more notice of a government document than the trade association. The good people would keep proper books anyhow. It is invariably the bad bankrupt who does not keep books.
732. Even if you made a statutory provision, a bad bankrupt is still going to ignore it? - Yes, you cannot make people good by legislation.
733. Chairman: Incidentally, I do not think we should ever get the Government to circulate all the retail traders with a tract telling them what books to keep and how they should keep them. - (Mr. Docking): I do not think that is practicable.
734. What I think your various associated Chambers might possibly consider doing is circulating a copy of Section 158 to their members which would show them what the minimum required by law was. But that is rather a matter for you than for us. - Yes.
735. I am afraid I do not quite understand the next thing you say here, which is about the provision that a trustee could claim property or the value thereof in relation to any fraudulent conveyance, and so on. As I understand it, if it is an actual fraud on creditors, the property is recoverable by the trustee under the law as it stands, right back for six years, under what is now Section 172 of the Law of Property Act. Were you talking about actual fraudulent conveyance or was this intended to apply to the so-called fraudulent preference? - (Mr. Hull): To the fraudulent preference, really.

736. Does it mean that you think that the trustee should go back as regards the so-called fraudulent preference for the whole period of six years? - (Mr. Docking): The suggestion by the people of these other Chambers is that it should be six years. That seems a very long while.

737. After all, a so-called fraudulent preference is a payment to a genuine creditor and the principle has always been, until now, that provided a man does not go bust within six months he is entitled to pay his genuine creditors in any order he pleases. I should have thought myself that to create uncertainty as to whether you could retain payments for as long as six years would lead to a very serious upset in commerce. It rather sounds to me as though it is a suggestion made by somebody who did not quite appreciate the difference between an actual fraudulent conveyance and a so-called fraudulent preference. - There certainly does not seem to be any general consensus of opinion on this point. - (Mr. Stevenson): I have found the actual submission. It is as quoted, but as far as I can see it is an isolated one.

738. It is definitely a suggestion by someone who was confusing the two things? - (Mr. Docking): Yes, I think so.

739. You do agree, do you not, that if it is intended to apply to fraudulent preference it is really beyond the realm of practical policy? - Yes, I certainly do.

740. The next one of your general suggestions, which I am afraid I do not understand, reads:

"Sums set aside for the payment of General Rates due to a Local Authority in the United Kingdom should be capable of being used as a debt to found a Petition in Bankruptcy."

Can you say what that is intended to mean? - I do not know. Quite frankly, I do not know what it means. It was sent down to us and I puzzled over it, but I, personally, can find no meaning to it. We had a preliminary discussion this afternoon, and we made no headway on it at all. We thought it might be something to do with sums paid in advance to local authorities on account of rates, but that did not make sense. As we do not know what it means at all, we should like, on behalf of the Chamber, to withdraw it.

741. Your suggestion about the honest man who pays up the debts of his bankruptcy, but is taxed in full on his earnings, seemed to us an admirable suggestion, but it is rather outside our province, is it not? We are only asked to recommend amendments to the Bankruptcy Acts. - (Mr. Stevenson): It is a point which seemed to have a sufficient interest, if I may say so, to allow of its bringing forward.

742. It is a most interesting point, but I do not think we can do anything about it within our terms of reference. I am afraid, also, that your suggestions about the six monthly audit and the questions asked of trustees are rather outside our powers, because they do not come into the Acts. But if it is any consolation to you I gather that the practices you suggest has been largely adopted by the Board of Trade even before your memorandum came in. Do I understand that, as regards proofs of debt, you are proposing to save expense by not requiring the creditors to swear them at all, unless the Official Receiver asks that they should be sworn? - (Mr. Docking): This, again, is just a suggestion which has come up from somebody, and I do not think there are a great number of people who have expressed any opinion on this subject. But I should have thought it was very necessary that there should be some definite form of proof of a debt, and a cost of 2s. 6d. is trifling. If I may say so, I think it is a bad suggestion.

743. Which do you object to most, the affidavit fee or the 1s. 6d. stamp? - I do not object to either very much, but the 1s. 6d. stamp is the one I should object to, if I had to object to it. But I think there should be an affidavit. I think debts should be proved.

744. If the Official Receiver takes the oath, which he can do, there are no fees payable for the oath? - I believe that is so.
745. So there is only the 1s. 6d. stamp? - Yes.
746. I rather agree that it means that a creditor, who has lost his money, has to pay 1s. 6d. for the privilege of proving he has lost it, but that involves the whole question of fees in bankruptcy. - (Mr. Stevenson): It is an isolated opinion again. - (Mr. Docking): It does not seem a matter of very great importance, and worthy of the time of the Committee.
747. I suspect that your next suggestion is also a rather isolated one. This proposes bringing the bankruptcy procedure more into line with the voluntary winding-up of companies. We thought that that was possibly a bit of rather fallacious reasoning, with great respect, because the essence of bankruptcy, after all, is that it is compulsory. - I think your assumption is correct.
748. Your suggestion of trustees and the Official Receiver being allowed to pay small fees without taxation has been made to us by others, as well. What sort of amount do you contemplate? - (Mr. Stevenson): I have the submission before me, but there is no mention of the figure.
749. The suggestion made by another witness was £10. I do not know if that is the sort of thing you contemplate? - That should be sufficient. It is a reasonable sum. - (Mr. Docking): We would certainly concur with that figure.
750. You would be in favour of limiting taxation to solicitors' bills? - Yes, I should.
751. Has it been your experience that the Official Receiver has been handicapped by having no funds? A deposit is asked for, expressly to meet initial expenses. - I have no experience to enable me to assist you. - (Mr. Stevenson): There again it is one opinion, but it came from a very large and a very widely based organisation; an organisation which brings within its membership not only retailers but members of professions, and wholesalers and manufacturers. Would it be possible for a fund to be available to meet those cases, rather than that it should have to be provided, as at present, by the petitioner having to pay £7. 10. 0. deposit to the Official Receiver?
752. That is getting on towards the prospect of a nationalised bankruptcy service, is it not, which I am afraid is rather outside our terms of reference? - The specific recommendation concerns funds at the disposal of Official Receivers, and that would need to be a national fund.
753. The last thing in your memorandum is something which not only we, but I think every witness we have had has entirely agreed with, and that is that the reputed ownership clause is entirely out of date. - (Mr. Docking): Yes, I see you have already struck it out of your copy here.
754. Mr. Emerson: On the question of the postal vote by the committee of inspection, supposing you cannot get a quorum of the committee, would you be in favour of a resolution being binding if all the members of the committee agreed to it in writing? - (Mr. Hull): I should say, yes. It follows company law practice in a large number of cases.
755. Would you be in favour of a trustee under a deed of assignment, if he was not satisfied with the debtor's conduct, being able to put the matter into bankruptcy? - Speaking personally, I would have put him past bankruptcy: I would put him in gaol. But from practical experience, it is difficult when you have an assenting debtor who is awkward. It would be nice if you could put him into bankruptcy.

756. Would you agree with the suggestion that a deed of assignment should only be available as an act of bankruptcy for one month? - I think if it is going to be used as an act of bankruptcy there should be a rather restricted time limit for it to be so used.
757. There has been a suggestion that members of the committee of inspection, when attending meetings, should receive a small fee, in addition to their out of pocket expenses. The fee suggested is a guinea. - It is sometimes hard to get people to a committee of inspection. If a committee member loses time and gives service I think his efforts ought to be acknowledged, if only in a small way.
758. By an attendance fee of a guinea? - Yes.
759. Mr. Sherwell: Would it make people more likely to attend, if they got a guinea? - Some would, but the only question is the man who signs in at 2.30 and goes again at 2.45 - having got in his attendance - owing to urgent business elsewhere.
760. Mr. Lloyd Williams: But he has not earned his guinea? - He may be on three committees at the same time, and earning three guineas out of them. - (Mr. Stevenson): By and large we would favour it.
761. Mr. Sherwell: At the moment, a general proxy can only be given by a creditor to someone in his employ. Would it be convenient to the general body of traders to be able to give a general proxy to whomsoever they liked? - (Mr. Docking): I should have thought so. It might be his accountant. - (Mr. Hull): I see no reason why not. The Companies Act, 1948, has said that one may appoint a person not a member of a company. I see no reason why bankruptcy should be different.
762. Chairman: Would you be in favour of a general proxy, who was not in the permanent employment of the creditor, serving on the committee of inspection? - I should say no, myself. My first reaction would be no. Proxies are often appointed to go and hear what is happening, and see what is taking place, and what is the debtor's reaction and things like that, and they go back and report. But to give the same man the right of being appointed to a committee of inspection, because he happens to be present there or is known, may not be desirable from the creditor's position. - (Mr. Docking): I think you may get anybody on to the committee of inspection in that way, and they may possibly be quite undesirable people.
763. Have you any views on that Mr. Stevenson? - (Mr. Stevenson): I think it could be very dangerous to allow a proxy to serve on the committee of inspection.
764. I think that is all we want to ask you. Thank you very much for your attendance.

(The witnesses withdrew)

Monday, 11th June, 1956

Present

HIS HONOUR JUDGE BLAGDEN (Chairman)
 MR. H. REER, C.B.
 MR. C.E.M. EDMERSON, F.C.A.
 MR. H. LLOYD WILLIAMS
 MR. H.B. PEIRCE, O.B.E., J.P.
 MR. N.B. SHERWELL, O.B.E.
 MR. B.E.P. MACTAVISH (Joint Secretary)

MEMORANDUM SUBMITTED BY
THE SOCIETY OF INCORPORATED ACCOUNTANTS

This memorandum is in four sections:-

- Section A. Comment on the matters set out in paragraph 3 of the letter of 2nd November, 1955, from Mr. B. MacTavish, Joint Secretary of the Bankruptcy Law Amendment Committee.
- Section B. Suggested amendments to the Deeds of Arrangement Act, 1914.
- Section C. Other amendments to clarify questions of doubt or to facilitate administration. Paragraph 4 of the letter from Mr. B. MacTavish refers. These suggestions are arranged in the order in which they occur in the Bankruptcy Act, 1914.
- Section D. Amendments to bankruptcy law calculated to bring bankruptcy procedure into nearer conformity with liquidation procedure.

Section A.

Comment on the matters set out in paragraph 3 of the letter of 2nd November, 1955, from Mr. B. MacTavish, Joint Secretary of the Bankruptcy Law Amendment Committee.

1. The Discharge of Bankrupts: The Scheme in the Appendix to the Letter.

There is a division of opinion about the suggestion that every bankrupt should be automatically discharged at the end of two years after the conclusion of the public examination unless a caveat were entered on the Court file against such automatic discharge, as contained in subparagraphs (a), (b) and (d) in the appendix to the letter.

Some favour the caveat system as suggested.

Some favour the caveat system but think that the period of two years is too short. They suggest four or five years as being more suitable.

Some are against automatic discharges, even with the safeguard of the caveat, and think that every bankrupt should be required to apply for his discharge in order to obtain it.

All are concerned at the large numbers of undischarged bankrupts and would be glad to see some means adopted of reducing them. The administrative convenience of the scheme suggested in Mr. MacTavish's letter is appreciated, but the weight of opinion is in favour of increasing the period from two to four or five years and against automatic discharges without application by the debtor.

The proposal in subparagraph (c) that bankrupts whose discharge was refused should keep in touch with the Official Receiver and account to him at intervals of six months is supported. It might be applied to other bankrupts, e.g., by Court order on application.

All are opposed to the suggestion for the automatic discharge of all existing bankrupts who have not been bankrupt on more than one occasion and whose discharge has not been refused by the Court, which is outlined in subparagraph (c) of the appendix to the letter.

The reasons put forward in support of the above views are as follows:-

(1) Those favouring the caveat system were of the opinion that the Official Receivers of the Board of Trade, by reason of their wide experience of a large variety of cases, were in the best position to judge the value of the suggestions.

(2) Those who favoured the caveat system but thought that the two years period was too short did so because:-

(a) In some cases facts relevant to the question of the debtor's discharge would not come to light in this period - indeed, some debtors might be tempted to try to suppress information about themselves or their estate during such a relatively short period.

(b) They were of the opinion that not sufficient time would elapse to permit the operation of the after-acquired property provisions to have a reasonable chance of producing some benefit for the creditors.

(3) Those who were against automatic discharges, even with the safeguard of the caveat, attach considerable importance to the principle that discharge is a privilege which should only be granted to debtors who are willing to submit their conduct to a final assessment by the Court.

(4) The automatic discharge of certain existing undischarged bankrupts is opposed for the following reasons:-

(a) Many bankrupts whose discharge might be a danger to the trading community would not have applied for their discharge because aware that it would probably be refused, yet because their discharge had not been refused by the Court, they would be in a position to receive an automatic discharge, provided that they had not been bankrupt on more than one occasion. The automatic discharge of a large number of existing undischarged bankrupts would thus release on to the trading community a number of undesirable persons who would forthwith be able to trade under cover of limited liability companies, etc.

(b) If any attempt were made to examine the facts of each case before granting the discharge the administrative problem facing the Official Receivers and the Courts would be enormous and the expense probably prohibitive.

The solution suggested is to allow all existing undischarged bankrupts who have not applied for their discharge at the commencement of any proposed new Act to remain undischarged bankrupts, until death if necessary, but with the benefit of their existing remedies.

Recommendations:-

A. If a system of automatic discharge, subject to a caveat, is introduced:-

(1) The period which must elapse before an automatic discharge can operate should be increased from two to four or five years.

- (2) In that case, the Official Receiver should have power to enter a caveat against an automatic discharge at any time during the four or five years, and not only on the conclusion of the public examination.
- (3) The trustee in bankruptcy of the debtor's estate should also have power to apply to enter a caveat within this period.
- (4) Any provision for an automatic discharge should not operate on the occasion of a second or subsequent failure (not necessarily bankruptcy). This effect could be obtained by a rule that in such circumstances the Official Receiver should invariably enter a caveat.

B. The preferred method of reducing the number of undischarged bankrupts is to place on all bankrupts a duty to take steps to bring the question of their discharge before the Court after the lapse of a reasonable time, if they have not previously done so. This could be done by providing that, at the end of four or five years from the conclusion of the public examination, the Official Receiver should send the bankrupt a notice requiring him to apply for his discharge, if he had not previously done so, within a specified time after receipt of the notice. Failure to do so would, on proof of service of the notice, be punishable as contempt of court.

The present procedure for giving notice of the application for discharge to all interested parties should be retained.

The new procedure would apply only to persons adjudicated bankrupts after the new Act came into operation.

All existing undischarged bankrupts at that date would retain their existing remedies.

2. Application of After-Acquired Property in a Second or Subsequent Bankruptcy.

On this issue there are divided views. The majority view is that assets acquired by a bankrupt after a previous bankruptcy should, so far as not already distributed by the trustee in the previous bankruptcy, be divisible among the creditors in the second or subsequent bankruptcy in priority to any debts remaining unpaid in the first bankruptcy. The minority view is that matters should be left as they now are under Section 3 of the Bankruptcy (Amendment) Act, 1926. There are good reasons for both views, and the Council feel unable to do more than report that the balance of opinion among members of the Society seems to be in favour of the first.

3. Increase in the Monetary Limits Prescribed by the Bankruptcy Acts.

The only increases recommended are:-

(1) Tools of Trade, etc. Section 38 (2).

The value of the tools of trade, apparel and bedding of the bankrupt and his family which are not comprised in the property divisible among his creditors should be increased from £20 to £150.

To prevent possible disputes and abuses, the subsection might be re-written in the form "The necessary tools (if any) of his trade and the necessary wearing apparel etc."

(2) Summary Administration of Small Estates. Section 129.

The Court should have power to make an order for the summary administration of the estate when the property of the debtor is not likely to exceed in value £500 (instead of £300).

There should be no increase in the minimum debt of £50 prescribed by Section 4(1) (a) as necessary to support a creditor's petition. It is felt that this amount was originally fixed at what was at the time a rather high figure. It is regarded as now fixing a fair limit to the liability to be adjudicated on a creditor's petition.

4. The Advisability of Limiting the Vesting of After-Acquired Property to Such Property as may be Claimed by the Trustee.

This has been taken as referring to the decision in Re Pascoe, (1944) Ch. 219, (1944) 1 All E.R. 281, wherein it was decided by the Court of Appeal that after-acquired property of a bankrupt vests automatically in the trustee in bankruptcy under the Bankruptcy Act, 1914, Sections 38 (a) and 47 (1), although the bankrupt has certain rights in respect of it, such as the right under Section 47 (1) to pass a valid title thereto to a person dealing with him bona fide and for value.

No examples of difficulties arising from the decision in Re Pascoe have been brought to the notice of the Council of the Society, but it is clear that the decision could create difficulties where property burdened with onerous conditions is acquired by or devolves on the bankrupt after his adjudication.

It is therefore suggested that it would be advisable to limit the vesting of after-acquired property to such property as may be claimed by the trustee, thus restoring the position to what it was thought to be before the decision in Re Pascoe.

5. Appointment of Official Receiver as Trustee in Non-Summary Case.

It is agreed that, if they so desire, creditors may leave the administration of the estate in the hands of the Official Receiver.

6. Conclusion of the Bankruptcy and Re-vesting of the Surplus Where Debts Paid in Full.

It is agreed that, where all the debts are paid in full with statutory interest, there should be provision for a conclusion of the bankruptcy in so far as it affects the debtor's property. In such a case, there is no point in the continued operation of the after-acquired property clause, nor in the retention of bankruptcy inhibitions, etc. registered against the debtor's interests in land. The conclusion of the bankruptcy should therefore exonerate his after-acquired property from the claims of the trustee and the creditors, and power should be given to the appropriate person to give a certificate of the conclusion of the bankruptcy enabling such registrations to be vacated or removed without the necessity for an application to the Court. Some documentary evidence establishing his title or his right to deal with the assets should be made available to the debtor.

It is understood that the question of the debtor's personal discharge from bankruptcy will be kept distinct from that of the conclusion of the administration of his property in bankruptcy. If, therefore, his discharge or the annulment of his bankruptcy is refused because of his misconduct, he will still be under personal disabilities.

7. Enlargement of the Provisions of Section 51.

(1) Inclusion of Wages in Addition to Salary or Income.

It is agreed that the provisions of Section 51 should be enlarged to cover all kinds of earnings, including wages, in addition to "salary or income".

The word "wages" will probably need some definition. An exhaustive definition would be difficult to frame, but an "inclusive" definition would be helpful. It should clearly cover piece rate, day rate and weekly wages, overtime, and wages earned wholly or in part by way of commission.

8. The Board of Trade's Power to Conduct Prosecutions.

The Council of the Society support the proposal that the Board of Trade should have power to institute and carry on all prosecutions for offences under the Bankruptcy Acts in lieu of the Director of Public Prosecutions.

9. Board of Trade Control over Administration under Deeds of Arrangement.

A deed of arrangement is a private affair, the whole object of which is to avoid publicity, formalities and restrictions. Creditors are not obliged to assent, and if they do, it is up to them to look after their own interests. It may be that the Board of Trade have evidence of a need for greater control over the administration of assets vested in a deed trustee, but the Council has none, and accordingly recommend no change in this respect in the present law and procedure applying.

(In the part of this memorandum immediately following, we suggest certain changes in the law applying to deeds of arrangement.)

Section B.

Suggested amendments to the Deeds of Arrangement Act, 1914.

There are many objections to the present working of the Deeds of Arrangement Act, 1914, the principal being:-

- (1) That in view of the operation of the doctrine of the relation back of the title of the trustee in bankruptcy, it is not safe in practice to pay dividends to creditors under deeds of arrangement until three months have passed since the date of execution of the deed.
- (2) A trustee under a deed which is avoided by the subsequent bankruptcy of the debtor can be treated as a trespasser and allowed no remuneration, even for work beneficial to the estate.
- (3) In practice unscrupulous creditors are able to "blackmail" the arranging debtor by the threat of bankruptcy into paying them more than he pays other creditors.
- (4) Creditors often assent to deeds without being aware of their contents.

Suggested Amendments.

Since a type of voluntary liquidation by an individual is involved, it is suggested that the procedure for negotiating the acceptance of a deed of arrangement by the creditors should be as far as possible similar to that applying in the voluntary liquidation of companies.

In order to eliminate the difficult waiting period of three months, it is suggested that the period in which a creditor may present a petition based on the execution of a deed of arrangement as the act of bankruptcy should be cut down, and that the Court should have to be satisfied by the petitioner that the deed is not in the interests of the creditors as a whole before it could make a receiving order on the petition.

It is therefore suggested that:-

- (1) First Meeting of Creditors. The first meeting of creditors might be called by notice in the Gazette and two local papers (seven clear days' notice is suggested).
- (2) Appointment of Trustee. If the creditors resolve by a majority in number and value to accept a deed of assignment, or deed of composition, they should appoint the trustee at the meeting.

(3) Bankruptcy Petition based on the Deed. A creditor may present a bankruptcy petition based on these proceedings within, say, twenty-eight days after the date of the meeting, but in order to succeed he must establish that the deed is not in the interests of the creditors, e.g., because the acceptance of the deed by the other creditors constitutes a fraud on the minority of creditors, or fraud otherwise exists, or the trustee appointed under the deed, by reason of his connection with the debtor, is prevented from acting impartially. Section 5 of the Bankruptcy Act should be amended to cover this procedure.

(4) Relation Back. If bankruptcy should ensue on this petition, then the title of the trustee in bankruptcy should relate back to the date of the meeting of creditors or the date of filing the petition on the date of execution of the deed by the debtor, whichever is the earlier.

(5) Recourse to the Court by Deed Trustee. Recourse to the Court, e.g. under Section 25 of the Bankruptcy Act, should be available to the trustee under the deed in the same way as recourse may be had by the trustee in bankruptcy or the liquidator in a voluntary liquidation.

(6) Reporting Offences. It should be possible for the deed trustee to report bankruptcy offences punishable by fine or imprisonment to the Board of Trade in like manner to the procedure in voluntary liquidation, and in respect thereof the debtor should be made amenable to the penalties set out in the Bankruptcy Act.

(7) A Statutory Form of Deed. To overcome objection (4) above, there should be a statutory form of deed of assignment included in the Deeds of Arrangement Act and made compulsory so that every creditor could be aware of what he has signed. The statutory form of forms could be the same as one of the printed forms of deed which at present can be purchased at a Law Stationers.

(8) Position of the Deed Trustee. If bankruptcy supervenes, the Official Receiver or trustee might be required to treat the trustee under the deed of arrangement as an agent and not as a trespasser unless he can prove that the deed trustee has damaged the estate through his own default or negligence.

(9) Qualification for Appointment as Deed Trustee. In Section C, paragraph 4, below, it is recommended that the persons qualified for appointment as trustees in bankruptcy should be the same as those qualified for appointment as auditors of registered companies (other than exempt private companies).

It is recommended that the same persons should be qualified for appointment as trustees under deeds of arrangement.

(10) Unclaimed Dividends. It is suggested that dividends under a deed of arrangement which remain unclaimed at the end of two years from the date of registration of the deed might be paid into the Bankruptcy Estates Account, in order to save the expense of obtaining an order for payment into Court.

(11) Accounts. Accounts rendered by deed trustees under the Deeds of Arrangement Act, 1914, Section 13 and 14, should in respect of the second and subsequent accounts show the balance at the beginning and end of the period, as well as the receipts and payments of the period.

Section C.

Other amendments to clarify questions of doubt or to facilitate administration. Paragraph 4 of the letter from Mr. B. MacDavish refers. These suggestions are arranged in the order in which they occur in the Bankruptcy Act, 1914.

1. A complete consolidation.

A complete consolidation of all enactments dealing with bankruptcy might be effected on this occasion. It would be a convenience to have all the statutory rules applying put in one Act.

2. Proxies. Section 13(2) and First Schedule.

The regulations governing creditors' proxies in bankruptcy appear to be needlessly complicated. It is suggested that they should be similar to those which apply in winding-up, and accordingly that:-

(1) Insertions should no longer be required to be in the handwriting of the person giving the proxy, his manager, clerk or other employee, or a commissioner of oaths, as in para. 16 of the First Schedule to the 1914 Act.

(2) A general proxy may be given to any person, as under Rule 149 of the Companies (Winding Up) Rules, 1949, and should not be confined to the manager, clerk or employee of the creditor, nor should the instrument have to state the relation of the proxy-holder to the creditor, as now required by para. 18 of the First Schedule to the Bankruptcy Act, 1914.

(3) All the regulations governing the form and use of proxies might be gathered together, either in a schedule to the Act or in the Rules, instead of being partly in one and partly in the other.

It is also suggested that the Board of Trade might be asked to review the adequacy of the present rule against solicitation in obtaining proxies, paragraph 21 in the First Schedule to the Bankruptcy Act, 1914. According to information given to the Council, this practice still continues.

3. The Completion of the Statement of Affairs. Sections 14(1), 74(2) proviso; B.R. 313.

The Council recommend that, where the Official Receiver employs a qualified accountant at the expense of the estate to assist the debtor in the preparation of his statement of affairs, a reasonable scale of fees for the accountant should govern the amount of the remuneration to be allowed to the accountant.

The reason for this recommendation is that very small fees, not commensurate with the work done, are sometimes accepted in the hope that the person concerned will be elected the trustee of the estate and will thus be able to compensate himself to some extent for the inadequacy of the fee accepted in connection with the completion of the statement of affairs. This the Council regard as undesirable. They take the view that the fees for accounting work should, whenever possible, be commensurate with the work which the accountant has in fact done. They see no reason why this should not apply in this instance, and they think it would be in the public interest that it should.

4. The Qualifications of Trustees. Section 19.

It is recommended that a person shall not be qualified for appointment as trustee of the property of a bankrupt unless he is also qualified for appointment as auditor of a limited company which is not an exempt private company.

The interest of the Society of Incorporated Accountants in this recommendation is so obvious that it scarcely needs to be declared. It is not, however, put forward merely on narrow professional grounds, but because the Council take the view that it would be in the public interest to require such a qualification.

A large part of the work of trustees in bankruptcy consists of the investigation of matters involving accounts, and it is submitted that this

by itself indicates that appointments could with advantage be limited to persons whose training and experience fit them for this work.

A second advantage claimed for this recommendation is that the great majority of the persons qualified for appointment as auditors of limited companies are members of professional bodies and subject to professional discipline. Canvassing for support, which has a bad effect on the independence and standing of the trustee and on the regard given to this type of practice in the accountancy profession, could be checked.

It is therefore proposed that the appointment of trustees should be left in the hands of the creditors, but that appointments should be confined to persons qualified as suggested above.

It is also suggested in Section B, suggestion (9) above, that trustees under deeds of arrangement should be similarly qualified.

5. Committee of Inspection. Section 20.

(1) To save trouble and expense in calling meetings of creditors, it might be provided that vacancies in the committee could be filled by the committee itself. Section 20(8) should be amended accordingly.

(2) The doubt expressed in *Re Bulmer*, (1937) Ch. 499, whether a limited company can validly be appointed a member of the Committee of Inspection should be resolved. We think that a company should be eligible for election through a duly appointed representative.

(3) It might be provided that, where a local bank account is used, the trustee should have power to pay out-of-pocket expenses of members of the Committee of Inspection without having to make application to the Inspector-General in Bankruptcy.

6. Set-off Debts by Government Departments. Section 31.

One government department will claim to set off a debt due by them against one due to another department, and thus pro tanto obtain payment in full.

It is suggested that this matter should be examined.

7. Preferential Debts. Section 33, etc.

(1) Wages and Salaries.

It is popularly believed that wages and salaries and lately holiday pay are preferential debts payable immediately a bankruptcy or liquidation commences.

The trustee whose duty it is to discharge workmen is often put in an embarrassing position by having to explain to them that they cannot be paid their arrears of pay until it has been established that there are sufficient liquid funds available to discharge not alone their claims, but the claims of all other preferential creditors at the same time. It often takes many months before arrears of unpaid taxation can be agreed, and in the meantime the unfortunate employees have to wait for their money.

It is suggested that the wages and salaries and holiday pay of employees should be re-classified as pre-preferential debts. (This need not extend to subrogated claims, if such are introduced).

(2) Loans to Pay Wages.

The omission from bankruptcy of the subrogated rights of third parties in regard to wages and holiday pay is a source of confusion, and it is not obvious why this provision should apply in winding-up but not in bankruptcy.

In the interests of workmen, it is recommended that the "loan to pay wages" provision should be extended to bankruptcy.

If for administrative convenience arrears of wages and holiday pay are given a special "pre-preferential" status, this should not be extended to the claims of third parties who have advanced money to pay wages.

Consideration might be given to the relationship of the "loan to pay wages" with the "loan by a husband or wife" under Section 36. It may be thought that to the extent to which a loan by a wife to her husband, or vice versa, has been used to pay wages which would have been preferential, the wife or husband might stand in the shoes of the employees so paid.

(3) Travelling and other Expenses.

Consideration might be given to including in the definition of wages and salaries for this purpose any travelling or other expenses incurred by employees in the course of their duties, which would normally be reimbursed to them with their remuneration. The trustee could then include in the amount to which priority is given all those out-of-pocket expenses which would normally be added on to the salary cheque or included in the pay envelope.

The same time limit should apply to such expenses as applies to claims for arrears of wages, but it would not be appropriate to include such expenses when applying the limit of £200 to the claim.

(4) A Comprehensive Statement of the Preferential Debts.

It is recommended that, in any new Bankruptcy Act which may be passed, a comprehensive statement of the preferential debts as they exist at that time should be written into the Act. The phraseology adopted should be, as far as possible, the same as that which applies in the winding-up of companies.

(5) The Claims of Public Utilities.

The Council find that there is resentment of the ability of public utilities to insist on payment of arrears in full where a continued supply of their service is essential for trading or realisation purposes. The public utilities are in these cases able to insist on being treated in effect as pre-preferential creditors, largely because of their monopoly position.

It is recommended that the matter should be examined. It is pointed out that the Postmaster-General will make a fresh contract for the supply and use of telephones without insisting on payment in full of the old telephone account. It is also pointed out that all the other bankruptcy priorities now rest upon statutory authority.

8. Husbands and Wives Claims. Section 36.

Under Section 36 of the Bankruptcy Act, 1914, a loan made by a wife to her husband for purposes of his business and vice versa is deferred until other creditors have been paid in full. If the husband used the money for purposes other than his business, the effect of the section can be defeated.

It is suggested that the operation of the section be extended to cover all loans by a wife to her husband and vice versa (subject to what is stated above in paragraph 7(2), Loans to Pay Wages).

The question of the wife's right to occupy the matrimonial home in cases where the parties have separated is one also meriting attention. This can be important where the equity in the freehold of the house passes to the trustee in bankruptcy.

9. Fraudulent Preference. Section 44.

(1) Fraudulent Preference.

The law in regard to fraudulent preference is uncertain owing to the onus of proof being on the trustee.

Section 44 of the Bankruptcy Act, 1914, makes void as against the trustee payments, etc., made by an insolvent person with a view to giving a creditor or surety or guarantor a preference over the other creditors, provided such payment was made within three months of the date of the petition on which the debtor was adjudicated bankrupt.

Section 115 of the Companies Act, 1947, (not repealed in 1948) extended the period from three to six months.

The Courts decided that the onus of proof of the debtor's insolvency and of his intention to prefer was on the trustee (Ex p. Green, 1898).

After the decision in Re Cohen (1924) it was thought that the onus of proof was sufficiently discharged by proving a preferential payment to a creditor by a debtor who knew he was insolvent at the time. This was accepted law until 1934.

The decision in Peat v. Gresham Trust Ltd. in 1934 made the trustee's task in seeking to set aside a fraudulent preference a very difficult one, as it appeared to require direct evidence of the intention to prefer, which could only come from the bankrupt himself. The position was somewhat eased, but not entirely restored, by the decision in Re M. Kushler Ltd., (1943) Ch. 248.

The difficulty would be overcome if the trustee could be allowed to produce as evidence in the motion to set aside the preference the admissions of the bankrupt made on oath at his public examination. At present this is not allowed. To rebut the said admissions, the defendant, if he chose to do so, could call the bankrupt as his witness, and if the defendant failed to call him the case could be decided by inference having regard to all the circumstances.

It is suggested that Section 44 might usefully be amended by adding a clause to the effect that the evidence given by the bankrupt in his public examination be admissible in the motion to set aside the fraudulent preference subject to the right of cross-examination by either party.

Alternatively, the problem could be met by enacting that the question of whether or not there has been a fraudulent preference shall be decided by inference from the surrounding circumstances and not necessarily from the bankrupt's own evidence.

(2) Fraudulent Preference for relief of Guarantor. Hardship on Bankers.

Section 115 of the Companies Act, 1947, (unrepealed) extends to bankruptcy the operation of Section 92 of its own provisions and gives to banks in fraudulent preference cases leave to bring in a surety or guarantor as a third party.

In these cases the bank is usually an innocent party receiving money into its customer's account without precise knowledge of the customer's circumstances and without knowing that the real intention of the customer is to prefer a guarantor.

10. Remuneration of Trustees. Sections 82, 83, B.R. 334-336.

(1) Where it is necessary to apply to the Court to fix the remuneration of trustees in bankruptcy, the Court tends to take the official Receiver's scale as a guide.

It is pointed out that this scale is not appropriate. Wholetime Official Receivers receive a salary and do not depend on the scale fees for their earnings. The scale is in any event in need of upward revision, and it does not take account of work, such as settling tax claims and liabilities, which may not be reflected in the realisations and distributions effected by the trustee. Consequently it often bears no relation to the amount of work done by the trustee and his clerks.

As a Society we are opposed in principle to the remuneration of our members being based upon percentages of amounts realized or recovered, and unless there is some strong reason in favour of the present method of fixing the remuneration of trustees in bankruptcy, we would prefer a rule that a trustee's remuneration should be fixed on a time basis according to the amount of work done. This would bring English procedure in this matter more into line with Scottish procedure.

(2) The problem of preventing the "splitting" of remuneration with third parties, etc. still merits attention. As in the case of solicitation for proxies, it is difficult to suggest a remedy, though the proposal in paragraph 4 above that trustees should only be appointed from specially qualified persons is made partly with this object in mind.

It is suggested that the Board of Trade be asked to consider whether Section 82 (5) could be strengthened. The subsection does not at present provide a sanction against the receipt of benefits beyond the remuneration fixed by the creditors.

11. Use of a Local Bank Account by the Trustee. Section 89.

The obligation to use the Bankruptcy Estates Account unless, for special purposes, the use of a local bank account is authorized by the Board of Trade on the application of the Committee of Inspection leads to a certain amount of delay in distributing dividends or effecting payments out of the account.

It is suggested that the use by the trustee of a local bank account should be permitted in the same way as in voluntary winding-up, and the provisions applying in bankruptcy amended accordingly.

12. Deceased Insolvent's Estate. Section 130.

(1) Section 130 of the Bankruptcy Act, 1914, requires that before a creditor can take out administration, he must give prescribed notice to the legal personal representative. If there is no L.P.R. or the next of kin cannot be traced, the creditor appears to be powerless as the Act is silent on this point.

It is recommended that a procedure for dealing with this situation be adopted.

(2) Extension of Trustee's Powers over Property.

It is recommended that Section 130 be amended so as to apply in the administration of a deceased insolvent's estate, as far as may be reasonable, the following sections of the Bankruptcy Act, 1914:-

Section 42, Avoidance of certain settlements.

Section 43, Avoidance of general assignments of book debts unless registered.

Section 44, Avoidance of preference in certain cases.

As the law now stands, the death of an insolvent person before a petition in bankruptcy is presented against him quite fortuitously deprives the trustee of his powers under these sections.

(3) Execution Creditor.

The relationship of the execution creditor's rights to those of the creditors generally in an administration under Section 130 could be clarified. Section 40 does not define the position where an execution is in process at the time when an administration order under Section 130 is made, nor does Section 41 refer to service on the sheriff of notice of a petition under Section 130.

(4) Personal Representatives' Right of Retainer.

The foundation for the rule that a personal representative of a deceased person has the right to retain assets out of the estate for a debt due to him from the deceased in preference to all other creditors of equal degree is apparently to be found in the inability of the representative to sue himself and thus to obtain priority as a judgement creditor of the estate. Since this priority to judgement creditors only applies in cases where the death occurred before 1926, it is suggested that the time has come for the rule of retainer to be reconsidered.

13. A Register of Undischarged Bankrupts.

In view of the possibility that existing undischarged bankrupts may remain undischarged indefinitely, it is suggested that there should be a public register of undischarged bankrupts containing prescribed information. This is a new idea in this country.

It seems to the Council that creditors' facilities for discovering whether a person is an undischarged bankrupt are not adequate. It is true that receiving orders, adjudication orders and orders of discharge are advertised in the Gazette, and that Section 155 of the Act throws on an undischarged bankrupt the duty, in certain circumstances, of providing creditors with a warning that he is an undischarged bankrupt or with the means of discovering this fact. Banks and other organisations obtain information from the Gazette, but they use this for their own purposes, and it is not always easy for a cautious trader to obtain the information, in spite of the publicity given to it.

In addition, it seems to us that the proposition can be put on a somewhat broader basis than that of the interests of creditors or intending creditors of the bankrupt. A question of special personal status with special disabilities is involved. We do not think that it is carrying the argument too far to say that it is in the general public interest that it should be possible to find out by reference to a public register who these persons under special disabilities are and where they live or carry on their activities.

We therefore suggest that consideration be given to this proposal. It is not an entirely new idea. We are informed that it was at one time the practice in New Zealand to publish annually in the New Zealand Gazette a list of all undischarged bankrupts. This was discontinued in 1936, but we are informed that a card index is now kept. It would obviously be an onerous undertaking to publish annually in this country a list which would initially contain particulars of upwards of 60,000 undischarged bankrupts, but the idea of making this information available to the public seems to us to be right.

Such a register might contain the name in which the bankrupt was adjudicated, with the date and place of the adjudication order and, if they are introduced, a note of any caveats against automatic discharge which may be entered against him. Bankrupts should be under an obligation to notify any changes of address or of name (by whatever process) to the Official Receiver, and these particulars too should be recorded in the register. A person's name should be removed from the register when his discharge became fully effective or on his death while an undischarged bankrupt. Machinery would have to be provided for the notification of these particulars. Some expenditure of public money would be involved, but we think it would be justified. One effect of the maintenance of such a public register might

be to induce more bankrupts to apply for their discharge in order to remove their names from the register. The additional publicity may have more than one use.

Section D.

Amendments to Bankruptcy Law calculated to bring bankruptcy procedure into nearer conformity with liquidation procedure.

The object of the following suggestions is to assimilate as far as possible the law and procedure under the Bankruptcy Acts with the law and procedure applying in winding-up.

At present regulations exist which require different treatment under each procedure for similar sets of circumstances. It would facilitate insolvency work if the regulations were as nearly as possible the same.

(1) The Doctrine of Relation Back.

The liquidator's title in general relates back to the date of the resolution for voluntary liquidation; or in compulsory liquidation to the date of the petition, if no voluntary liquidation precedes the petition.

In bankruptcy the trustee's title relates back to the first act of bankruptcy committed by the bankrupt within the three months next preceding the petition. It is this which renders the position of the trustee under the deed of arrangement so difficult. The trustee's title to assets in bankruptcy might be made to commence at the date of the petition as in liquidation. If this be accepted, there would be no need for the special rules with regard to deeds of arrangement suggested in Section B, suggestions (3) and (4), above.

(2) The Order and Disposition Clause.

This is another technicality which in practice can operate artificially and often unjustly to persons supplying goods to the bankrupt on sale or return.

The order and disposition clause has not been introduced in companies' liquidation, though if it had much value, there is no reason why it should have been omitted. In the interest of uniformity of procedure, it might be omitted in bankruptcy.

(3) Preferential Debts.

The omission from bankruptcy of the subrogated rights of third parties advancing money to pay wages and holiday pay is a cause of confusion which should be remedied by its being introduced in a new Bankruptcy Act. See Section C, paragraph 7 (2), above.

(4) Landlords' rights of Distress.

The landlord of a company would appear to have rights which are not available to the landlord of a bankrupt. There would seem to be no reason why these rights should not be made analogous.

(5) Execution creditors' rights.

There is no provision in the Companies Act, 1948, similar to Section 35(2) of the Bankruptcy Act, 1914, which defines the position where a judgement creditor levying an execution and a landlord with a power of distress are competing for the goods.

If the landlord's rights in a bankruptcy are assimilated to his rights in liquidation, the process should be carried on to Section 35 (2) of the Bankruptcy Act.

(6) Trustees' remuneration.

In bankruptcy a trustee is not allowed any percentage on assets realized by the Official Receiver, while in the winding-up of companies he is.

(7) Procedure.

There are differences in details of procedure, for instance, with regard to proxies (see Section C, para. 2), which might be abolished.

LETTER RECEIVED FROM SOCIETY OF INCORPORATED ACCOUNTANTS

Incorporated Accountants' Hall,
Temple Place,
Victoria Embankment,
London, W.C.2.

20th June, 1956.

B. MacFavish, Esq.,
Board of Trade,
Bankruptcy Department,

Dear Mr. MacFavish,

In response to your telephoned request, I send you some additional explanation of the points contained in paragraph 12(2) and (3), at page 13, in Section C of the Society's Memorandum.

Section 130. Extension of Trustee's Powers over Property.
Position of an Execution Creditor.

The decisions in Ex parte Official Receiver, Re Gould (1887), 19 Q.B.D. 92, and Hasluck v Clark, (1899) 1 Q.B. 699, are relied on as authorities for the statement that Section 47 of the Bankruptcy Act, 1883 (now Section 42 of the 1914 Act) and Section 45 of the 1883 Act (now Section 40 of the 1914 Act) did not apply in the administration of the estate of a deceased insolvent under Section 125 of the 1883 Act (now Section 130 of the 1914 Act). It may therefore be said that the provisions regarding the avoidance of voluntary settlements and the restriction of the rights of execution creditors do not apply in the administration of the estates of deceased insolvents in bankruptcy, unless -

- (1) the decisions have been over-ruled, or
- (2) there has been some change in the statutory provisions applying.

With regard to (1), I am not aware of any decision over-ruling Re Gould or Hasluck v Clark. It is, of course, difficult to be quite sure one has not overlooked a relevant authority, but if so, I err in good company, as all the books I have been able to consult, from Williams on Bankruptcy downwards, still refer to these decisions as having the effect stated above.

With regard to (2), it is true that the wording of Section 130(6) of the 1914 Act differs from the wording of Section 125(6) of the 1883 Act, but not, it is submitted, in such a way as to affect or alter the interpretation placed upon the subsection in the cases quoted.

The essence of that interpretation seems to be that Section 130(6) deals with the mode of administration of the debtor's estate, not with the subject-matter (the estate) to be administered. There are references in

subsections (1), (2), (3), (4), (7) and (9) to "the administration of the estate of the deceased debtor" and in subsection (6) to "the administration of the property of the deceased debtor". The section is, therefore primarily concerned with administration and with the estate of the deceased debtor. In accordance with Chancery practice, one would expect the estate of the deceased to mean his property as it was at the date of death, excluding any assets which he had conveyed to others before death (e.g. by voluntary settlement) and subject to any accrued claims of third parties (e.g., by delivery of a writ of *fi. fa.* to a sheriff). If Parliament had intended a trustee appointed under Section 130 to have the special powers accorded to a trustee in bankruptcy of swelling the estate by recovering property conveyed to others by the deceased or by over-riding the accrued claims of third parties, clear words showing such an intention would have been used.

These words are not to be found. Subsection (6) enacts that "With the modifications hereinafter mentioned, all the provisions of Part II of this Act (relating to the administration of the property of a bankrupt) and (certain specified additional provisions) ... shall, so far as the same are applicable, apply to the case of an administration order under the section in like manner as to an order of adjudication under this Act..." This wording may be contrasted with that used in subsection 16 (17) and (18), where Part II of the Act is applied to compositions on schemes of arrangement in bankruptcy. There it is expressly enacted, for instance, that 'order of adjudication' includes an order approving a composition or scheme. You do not find in Section 130 any general enactment that an order for administration under the section is to be taken as equivalent to an order of adjudication for the purpose of applying Part II of the Act, nor is there any rule to that effect in the Bankruptcy Rules. Section 130(6) therefore does not contain any clear words demonstrating Parliament's intention that a trustee under that section should have any of the special powers over property which an ordinary trustee in bankruptcy has. Accordingly the subsection has been interpreted as applying only to the "administering the property" provisions of Part II of the Act.

This provides the opportunity to emphasize that the Council of the Society are suggesting a deliberate change in the law. Under the Administration of Estates Act, 1925, where the estate of a deceased person is insolvent, the same rules prevail as to the respective rights of secured and unsecured creditors, the debts and liabilities provable and as to the priority of certain debts and liabilities as in bankruptcy. All that the creditors at present gain by having the estate administered in bankruptcy is that the administration is taken out of the hands of the personal representatives, the creditors can, if they wish, appoint their own trustee and elect a committee of inspection, bankruptcy rules of set-off apply, and the trustee can disclaim onerous property. It is suggested that the trustee should be given in addition the other special bankruptcy powers over the property for what they are worth. This would meet the objection mentioned in the Society's Memorandum that the death of a debtor who is threatened with bankruptcy can be a fortunate event as far as his estate is concerned by fortuitously depriving the trustee of all those powers, except the power to disclaim.

The Council's Memorandum also refers to:-

Section 43, Avoidance of general assignments of book debts.

Section 44, Avoidance of preference in certain cases.

Section 41, Duties of sheriff as to goods taken in execution.

It should be made clear that no authority can be quoted for the proposition that sections 43 and 44 do not apply in an administration under Section 130. The argument here is by analogy and on the principles established by *Re Gould and Hasluck v Clark*. With regard to Section 41, there appears to be some doubt whether notice of a petition under Section 130 is equivalent to notice of a petition in bankruptcy for the

purposes of subsection 41(2). See Williams on Bankruptcy, 16th edition, pp. 508-9, and the cases there cited. The Society's suggestion here is that the position should be clarified.

I hope this makes our views clear. If you would like any further explanations, please let me know.

Yours sincerely,

(Sgd.) T. W. South
Research Committee Secretary.

EXAMINATION OF WITNESSES

Mr. William George Ainge Russell, F.S.A.A.	}	Representing The Society of Incorporated Accountants
Mr. Arthur John Cooke, F.S.A.A.		
Mr. Daniel Mahony, F.S.A.A.		
Mr. Terence Wilton South		

Called and examined

765. Chairman: Gentlemen, we have had the advantage of reading your very comprehensive memorandum. You were of course, working on the scheme for discharges which was circulated to you last November? - (Mr. Russell): Yes, that is so.

766. Naturally we have been considering this scheme in the light of the evidence we have had, and we have now a rather considerably modified scheme in view, which you have not had a chance of considering. To put it very briefly, the scheme circulated provided for an automatic discharge two years after the public examination unless a caveat was entered at the conclusion of the public examination, and if a caveat were so entered then the discharge application would be considered on a date to be fixed, and if the application were refused then the bankrupt comes under onerous duties as to notifying his movements to the Official Receiver, and so on. The modified scheme, which we think is rather better than that, and about which we would like to have your views, is this: automatic discharge two years from the public examination unless a caveat is entered within that time - not necessarily at the conclusion of the public examination - and if the caveat is entered then the bankrupt becomes immediately liable to keep the Official Receiver informed of his movements, and so on, unless and until he applies for and gets his discharge. I do not know which of those two you think would be preferable? - (Mr. Cooke): I think our objection was to the two year period; we thought it was too short. That was our original objection, or one of our objections. - (Mr. Mahony): I would say that your second scheme is very much better than the first, but it still of course does not go so far as to deal with existing bankrupts.

767. No, but perhaps we might just leave existing bankrupts out for the moment, as that is really a separate problem. Does not the idea of applying for the caveat at any time within the two years go some way to meet your suggestion that the period should be four years? - I think it does.

768. Because the Official Receiver may be very much in the dark at the conclusion of the public examination, a lot of things may not have come to light? - Yes.

769. As regards your proposed period of four or five years, do you not think that that would lead to a great many applications for discharge from people who probably under our scheme would be content to wait for two years to get what they hope would be coming to them anyway? - (Mr. South): I think it is difficult to form a view about that. Up to now it seems that bankrupts have been very idle about applying for discharges, and it is a

little difficult to tell how far they would change their attitude. - (Mr. Mahony): But you do not contemplate, do you, not allowing a debtor to apply for discharge?

770. No, he can always apply; if he thinks he can get away with it in less than two years, very well. The scheme does not interfere at all with his power to apply for a discharge. I do not know if you were aware when you prepared your memorandum that two previous Committees, in 1906 and 1924, have recommended that there should be a provision for all discharges to be considered by the Court, and in each case the proposals were turned down on the ground of expense? - (Mr. South): Yes, we were aware of that.

771. If we may turn now to the existing undischarged bankrupts, what we were thinking of in that connection was this: there would be an automatic discharge two years - which I expect you consider too short - from the passing of the Act, unless firstly the bankrupt has not surrendered to the proceedings, or secondly he has had his discharge refused, or thirdly his public examination has not been concluded, or, in the fourth case, there is a second bankruptcy, or fifthly and probably most important in practice, unless a caveat is entered within the two years from the commencement of the Act, or whatever other period is ultimately decided upon. We thought of suggesting that, in the case of the existing undischarged bankrupt, the caveat could be applied for either by the Official Receiver or by the trustee. I do not know what your views about that would be, except that I take it you think two years should be a longer period? - (Mr. Mahony): That was the decision of our committee, but the other point of course was the amount of work that would be thrown on to the Official Receivers. If all those cases had to be dealt with in a very short time, it seems impossible that the Official Receivers with their existing staffs could cope with the enquiries and the reports. That was why we suggested that existing bankrupts should be allowed to carry on with their present remedies, with the bankruptcy going out of existence when they die, if they do not choose to apply for discharge themselves. - (Mr. Russell): We felt that to throw this large number of undischarged bankrupts suddenly on to the market, as it were, with an automatic discharge, would be rather flooding the market.

772. Mr. Lloyd Williams: Have you considered how many bankrupts in fact have had their discharge suspended for less than two years? - We had that factor in mind.

773. It is quite a big percentage, a very big percentage? - Yes.

774. So really the two years is going to cover a very big percentage of persons who would get a very much shorter period? - Yes.

775. Even those if they applied might well get their discharge in three months? - (Mr. South): Yes, a large proportion of them.

776. A very large proportion would get a very short suspension: had you borne that in mind? - Yes, I think we had. The bankrupts we had in mind were those who were likely to be refused altogether if they applied. We were unhappy about them.

777. They still can be refused, can they not? Also there could be a caveat entered in a bad case. - Yes, that would deal with them.

778. That would cover your point, would it not? - (Mr. Russell): If we knew that the caveat was going to be applied to bad cases as a protective measure, I think then it would go a long way to meet our point.

779. Chairman: The bad case surely is the sort of case that is vividly in the minds of the unfortunate creditors, and the minute this proposal becomes law the creditor will go to the Official Receiver - this is what we think will happen, of course it is difficult to prophesy - the creditor will go to the Official Receiver and say: "Do you remember that man, Cheatem, he is still an undischarged bankrupt, had you not better apply for a caveat?". That is the old bad case. Now the very recent

case, which may not be quite so bad but is so recent that the Official Receiver feels that the bankrupt ought not to get an automatic discharge in two years, that recent case of course would be fresh in the Official Receiver's own mind. In that way we hope that the sheep and the goats will be more or less separated, though some of the goats will probably get into the sheepfold by accident. - (Mr. Mahony): Yes. What did trouble us was that the administrative procedure of dealing with these cases in a very short time might have the effect of making the scheme unworkable.

780. We did not feel that the Official Receiver would have to consider every single case, by any means. Probably out of 40,000 undischarged bankrupts at the moment, the large majority are quite harmless people who did not know they could apply, or had been too lazy to do so. - (Mr. Russell): Yes, it just does not matter to them that they are undischarged; they are in jobs or something like that, probably. I think that explanation goes a long way to meeting the difficulties. - (Mr. Mahony): If the Official Receivers are happy that they can meet the administrative difficulty, we would be quite happy.

781. So far we have not found any objection from the Official Receivers on that account. I see an alternative proposal you put forward here is that the Official Receiver could give an existing undischarged bankrupt a notice requiring him to apply for his discharge, and if he did not he should be guilty of contempt. Is it not going to cost an awful lot of money, and take up a lot of time of the Court, if all of them in compliance with that notice come along and apply for their discharge? - Yes, indeed.

782. The alternative is that, supposing half of them do not apply for their discharge in pursuance of the notice, then the prison population goes up by many thousands, which is an almost equally undesirable result? - (Mr. Russell): That is very true. - (Mr. South): That recommendation was based on the feeling of many members that the right principle was that the debtor should be put under an obligation to take steps to terminate his own bankruptcy. I think a lot of our members thought that was the right rule to follow, although admittedly it would create a lot of work for the Courts.

783. Mr. Emerson: I think the National Chamber of Trade said that many people who were undischarged bankrupts would not apply because of the publicity, even though they had paid their debts in full. - (Mr. Mahony): Yes, that is another feature.

784. Chairman: The next matter you deal with in your memorandum is the second or subsequent bankruptcy, and I see the views of the majority of your members seem to go the same way as we are inclining. You say there are good reasons for both views. I wonder if you could tell us what you consider the reasons are? - (Mr. South): I think we argued it out broadly something like this: when you get a second bankruptcy, the second body of creditors have very likely entrusted goods to the debtor, and as far as that goes one would say the equity is in favour of the second body of creditors. On the other hand, although one is thinking of two competing bodies of creditors, we were informed that in many instances they are really the same body of creditors twice over, and whilst in theory one is sorting out the equities between competing bodies of creditors, in practice it is very often just the same people who have been dealing with the debtor twice in business, so in actual fact there is possibly not the degree of competition which one might expect. In view of that you could say that the equities are not quite so obviously in favour of the second body of creditors as might appear.

785. Is that your own experience, in practice, that the people who have been bitten once tend to be bitten again by the same man? - I cannot speak from personal experience, I can only speak from what members have told me, but apparently they did find in practice that they were very largely the same people on the second occasion.

786. That is very surprising, it sound like the desire of the moth for the candle. - (Mr. Mahony): That has not been my experience, I would have said it is exceptional. - (Mr. Russell): Yes, it is exceptional, but

it does occur because of the particular trade in which the bankrupt is engaged on the second occasion being the same as on the first, and the field of suppliers is very largely the same. But we felt on the whole - and I think we were right - that the first of those alternatives was the better.

787. The next matter with which you deal is monetary limits; you suggest the tools of trade should go up from £20 to £150. Do you think there is really need to go right up to £150? - I think we did it on the changed value of the pound compared with the time it was originally fixed. If £20 was right then, it seemed to us that £150 was a reasonable figure today. - (Mr. South): It includes bedding, apparel, tools and everything. If one includes all that and thinks of a possible family as well, anything less than £150 seems rather unreal.

788. Did you bear in mind the fact that he has probably got most of his bedding and the tools of his trade on the hire purchase system or in his wife's name? - (Mr. Russell): We felt that if there was any justice in this proposal it should be adequate justice. That was really the basis of suggesting this figure.

789. What about Section 23(1)(c), that is removal of goods after a bankruptcy petition is presented against him, rendering him liable to arrest. The limit at the moment is £5, which as I see it means he cannot walk across the road without getting permission of the Official Receiver, unless he does it in a state of nudity! Surely that ought to go up somewhat? - Yes. - (Mr. Mahony): But his wearing apparel is not deposited with the trustee or the Official Receiver.

790. But there is no exception made in Section 23, is there - "he removes any goods in his possession", that is the present wording. That would include his clothes, in which case a £5 limit is really ridiculous. - (Mr. Russell): Yes, it is, I agree. - (Mr. Mahony): Would it meet the point if you put "his own wearing apparel"?

791. What we thought of doing was that whatever figure we thought of for wearing apparel, bedding, etc., in Section 38 the same figure ought to go into Section 23(1)(c). - (Mr. Russell): I think that is logical. - (Mr. Mahony): Assuming you fixed the figure in Section 23 at £150, that would mean that he could move £150 worth of goods, and the goods would probably be stock, without running the risk of arrest.

792. If we fix it as high as you suggest for tools of trade, and so on, we probably ought to take a rather lower limit for what he may remove. - (Mr. Cooke): I should have thought somewhere in the region of £50 would be more reasonable. (Mr. Mahony): Or allow £50 worth to be removed and reserve the other £100 for his necessary tools and bedding.

793. Do you think your suggested figure of £500 for the ceiling for summary administration is enough? It is £300 at the moment. - (Mr. South): This was considered fairly carefully, and that was the conclusion which the committee reached, that the figure should be £500. It is not of course so great an increase as the one to £150, but it is perhaps subject to different considerations as to what is the right limit for summary administration, and that was the conclusion we came to. - (Mr. Mahony): Of course, it affects such questions as voting rights.

794. Yes, it affects quite a number of procedural matters. You think £500 is right? - (Mr. Russell): We have considered that very carefully, and we thought that £500 was the right figure.

795. We seem to be in agreement about the next points with which you deal. There is the question of the re-vesting of the surplus where payment in full is made, and of the bankrupt's personal status. Do I gather that it is your committee's view that even where he pays in full the bankrupt should not be entitled to an annulment, that the Court might in bad cases be able to refuse to annul the bankruptcy? - (Mr. Cooke): That is the practice at present.

796. Do you think it desirable? - In the only cases that I know of, I would say that it is perfectly correct and I should like to see the power continued.
797. One has of course to observe some sort of mean between expediency and ethics, does one not? - The decision rests with the Registrar, of course; he has a discretion, an absolute discretion.
798. Mr. Lloyd Williams: In practice I think such an application is never refused. If the debts are paid in full, I think it would be extremely difficult to refuse an annulment. I have never known it done. - (Mr. Mahony): I have known only one case, the case of Kauffman, a woman who never completed her public examination, did not file the accounts that were asked of her, and went off to America. In her case, although the son paid the debts in full, the mother's discharge is still suspended. - (Mr. Lloyd Williams): In that case the public examination had been started. I think perhaps I would have insisted on completion of public examination before I even considered the application. But my experience is that you get the application to annul before the public examination starts, as a rule.
799. Chairman: Supposing this is the order of events: first bankruptcy, then prosecution for a bankruptcy offence, and conviction; either whilst he is still in prison or when he gets out the man wins a football pool and is in a position to pay everybody in full, and does so - if his annulment is refused on the grounds of the bankruptcy offence, is he not being punished twice for the same thing? - That is a matter for the discretion of the Court, and something we would not deal with.
800. Mr. Emerson: We are thinking of suggesting that where the debts are paid in full the public examination need not be proceeded with. - (Mr. Lloyd Williams): Which is in fact what happens now, as a rule. The public examination is not started if there is an application for annulment. But if it is started and, as a result of something which comes out at the public examination to the discredit of the debtor, a speedy application is made to pay the debts in full to avoid a further disclosure, then that I think is a proper case in which to insist on the public examination being concluded. - (Mr. Russell): The power of refusal would only be exercised in quite exceptional cases, it would probably be the case of a very bad debtor.
801. Chairman: If you want it to stay, we may have to amend our redraft of Section 69. I wonder if you would be good enough to look at our proposed Section 69? I think, if we decide that we want to preserve a discretion in the Court to refuse the exceptionally bad case, all we need do is to substitute "may" for "shall" in subsection (4)? - Yes.
802. Apart from that were there any other points you wanted to make on the Section as drafted? - (Mr. Mahony): Is not the delay there of three months rather a long time "The trustee shall within three months after the day gazetted for the payment of the debts in full"? Suppose the bankrupt or his friends pay the debts in full on the day gazetted for payment, and the money is available and actually paid, then why should the trustee have three months' delay in which to file a certificate?
803. He has got to get his costs taxed, and that sort of thing, and his audit, has he not? - The bankrupt will not like it, of course. He will say: "I paid my debts in full yesterday, and I want to be free now to carry on my business without any hindrance".
804. Mr. Lloyd Williams: If the Board of Trade are prepared to give a speedy audit, then perhaps that will not apply, but if the Board of Trade are not prepared to give a speedy audit the trustee may be in difficulties? - If the trustee wants to help the debtor, he might even file the notice within a month, or a week. - (Mr. Peirce): There is nothing to prevent him doing so. The Section says "within three months".

805. Chairman: I think he may need the three months in some cases? - (Mr. Russell): Yes.
806. Subject to the possible substitution of "may" for "shall", you think it is alright? - Yes, I think it is an improvement.
807. Turning if we may to the next point, which is the inclusion of wages in Section 51, we were proposing to use the phrase "salary, wages, income or other remuneration". That surely is wide enough to cover everything, such as holiday pay, bonuses, overtime and so on? - I should think that wording was quite comprehensive, but it is a legal matter.
808. If it is comprehensive enough, we have not got to undertake the onerous task of defining the word "wages"? - (Mr. South): You would not consider the word "emoluments", would you?
809. There would be no harm in putting it in. - It looks to me as if it is possibly even wider than remuneration. - (Mr. Russell): It is the Companies Act wording, of course, is it not?
810. Yes, it is used in the Companies Act. - (Mr. South): I think in our review of the Companies Act we are asking for "emoluments" to be defined. - (Mr. Russell): It is essentially a legal problem, I feel, rather than an accountancy problem.
811. I see later on you have got a recommendation that the trustee should be a professionally qualified accountant, a person who could be an auditor of a public company. How about the Official Receiver in non-summary cases? - He is an expert in bankruptcy, that is what we felt. We thought that if you are going to require expert knowledge obviously you would include the Official Receiver.
812. If we adopted your other suggestion about the qualifications for trusteeship, we should have to bear in mind that we must make an exception in favour of the Official Receiver? - Yes, that is quite correct. - (Mr. South): We did not intend to cut out the Official Receiver.
813. Section B of your memorandum deals with deeds of arrangement. I do not know how far you consider that you could really press the analogy between deeds of arrangement and voluntary liquidations? Do you not think the essence of a deed of arrangement is that it is a private and adaptable document? - (Mr. Mahony): In so far as it extends to deeds of assignment, I think there is a very distinct analogy. But, of course, there is no provision in the Companies Act for anything analogous to deeds of composition. They can be arranged, but there is no specific provision made except through the Court calling special statutory meetings.
814. Am I right in thinking that in the majority of cases the voluntary liquidation is a voluntary liquidation of a solvent company? - (Mr. Russell): Yes, generally speaking, the majority would be solvent cases. - (Mr. Mahony): No, I would not agree at all. That may be so in the cases you meet, but the great majority of cases I should say are of the kind known as a creditors voluntary winding up.
815. With a creditors voluntary winding up the company is presumably insolvent? - Yes, and the members voluntary winding up of course is a case of solvency.
816. Mr. Bear: As I understand it, the analogy is between deeds of arrangement on the one hand and a members voluntary winding up? - The analogy would be between deeds of assignment and a creditors voluntary winding up.
817. Chairman: You suggest that there should be under any deed of arrangement, or possibly deed of assignment only, a first meeting of creditors? - There is one in practice, of course.

818. Would you wish to see that made compulsory? - I think it would be a great advantage, but the idea of having a compulsory meeting would have for its object the appointment of a trustee, who would then have some official status, whereas at the present time he is regarded as a trespasser.
819. Mr. Emerson: Surely you have had many cases where a deed has had to be executed quickly as a matter of urgency, and you have got no time to have a meeting? - In that case a meeting should follow, say, within seven days. I quite agree that it is very often necessary in order to dispossess a debtor or to protect his estate that there should be a deed of assignment executed at a moment's notice, and then that would be referred to the creditors.
820. Then the appointment would not take place at this meeting which you suggest, would it? - (Mr. Russell): It would be more in the nature of confirmation. (Mr. Mahony): Yes, it would be a confirmation within seven days.
821. Chairman: Are you very keen on this advertisement in the local paper? - No, that is merely a suggestion following the Companies Act procedure, so as to make the analogy with companies as close as possible.
822. Would not that largely destroy one of the benefits of the deed, namely, a certain amount of privacy? - I do not think so, because even now all deeds are registered, and publicity follows in the trade papers almost immediately. The privacy accorded to deeds of arrangement is not real.
823. It would be even more unreal if there has to be an advertisement in a local paper, would it not? - I do not think so. I think it would make no difference, in practice. There may be private arrangements where no deed is contemplated.
824. There are lots. We all know there are lots of arrangements, which are done under the counter. - But they are illegal, of course.
825. You suggest that the creditors should appoint the trustee at their first meeting. In your view is there any change in the Act necessary there, because the trustee in practice is nominated in the first instance by the debtor, but the creditors can always refuse to assent to the deed unless they get their own man in the saddle, can they not? - Yes, any one creditor now may refuse to assent to the deed and claim the right to file a petition in bankruptcy.
826. You think a change in the act is necessary? - Yes. At the moment under the Deeds of Arrangement Act the appointment of a trustee under the deed is not confirmed until the deed is three months old. The suggestion that we like is that the deed should become effective almost immediately the creditors by a majority assent to it, so that the trustee's position is safeguarded.
827. We were proposing to cut the time for a petition founded on a deed of arrangement down to a month. Would that help you, in your view? - I think that would help considerably.
828. Mr. Emerson: The deed still becomes a good deed as soon as you file the statutory notices, does it not? - It is a good deed except that for three months any creditor who has not assented has the right to file a petition.
829. Chairman: And in practice it may be a good deal longer, because there is all the time the petition is pending. He might file his petition on the last day of the three months? - Yes, indeed. - (Mr. Cooke): And that power is used quite widely, as an instrument of blackmail.
830. In addition to proposing to cut down the time of the petition to a month, we were also thinking of making some rather drastic amendments to the proceedings on that petition, and the quickest thing I can do is to...

refer you to our suggested Section 22(1). - (Mr. Mahony): I see you are still allowing or inferring in that Section that any act of bankruptcy - and there are seven other acts of bankruptcy besides the execution of the deed - that any one of those is still available to the creditor, and in that you are not safeguarding the position by the reduction to the one month.

831. If he has committed some act of bankruptcy connected with the deed, the trouble remains, I agree. - Then that does not help.

832. Mr. Lloyd Williams: An act of bankruptcy is an act of bankruptcy to the world at large, is it not? - But it is the doctrine of relation back in respect of those acts of bankruptcy that affects us.

833. If it is not in the interests of the creditors as a whole the Registrar can always refuse to make a receiving order? - But does not that remedy exist already? If a debtor's solicitor goes before the Registrar and says: "Here is a creditor who is petitioning with a view to obtaining undue advantage from the debtor", the Registrar at the present time has a discretion not to give the receiving order.

834. Chairman: That is quite true. We thought it desirable however to put that into the Act, so that it is there in black and white for all the world to see. What is more, we have provided that the Court shall - not may - dismiss the petition. We hope that is going to pare the black-mailer's talons to quite a considerable extent. - (Mr. Russell): I should think it will.

835. One of our witnesses suggested to us that the Court should, where it is alleged that the receiving order is not in the interests of the general body of creditors, advertise or gazette the petition, and hear any creditor who wishes to be heard, as in companies winding up. That would be a very novel suggestion as far as bankruptcy is concerned; I do not know what you think about it? - (Mr. Mahony): At the moment in companies, of course, a petitioning creditor may circularise the other creditors, and in practice he does, to support his petition. In bankruptcy of course that does not apply. It might be quite a useful procedure to have in bankruptcy. Then if the Court found that the weight of the wishes of the creditors was in favour of a private arrangement rather than a bankruptcy, the Court might be influenced by that evidence in the same way as the Court is now influenced in a companies case.

836. Do you not think, though, that the publicity attendant upon bringing the creditors into the chambers of the Registrar might in itself be rather a weapon in the hand of the blackmailing creditor? - (Mr. Russell): I think that is true. I think that is a factor which should be borne in mind.

837. Mr. Lloyd Williams: My experience is that even now there is quite sufficient publicity with a petition. It very frequently happens that if a petitioning creditor is going to be paid out, another creditor has heard about it and applies to be substituted. As Registrars, I think it would be impossible for us to advertise every petition which came in; it would delay the hearing, and it would require an awful lot of staff and lead to tremendous expense. - I agree, the news does not get round very quickly. - (Mr. Mahony): But if there were some ruling or some regulation under which the creditors could file notices of opposition to a petition, if following some meeting of creditors, they could file a resolution or letters with the Registrar protesting against the petition, the Registrar might be able to take notice of that, whereas at the present time he is apparently not able to do so.

838. Chairman: I think that could be done in practice if this Section goes through, could it not? The debtor who is the party who is respondent to the petition in bankruptcy can call the trustee under the deed; the trustee can say: "Every single creditor except this one has assented to the deed; there has been a meeting of creditors; the matter has been fully considered. Everybody except this man wants the estate to

be dealt with under a deed of arrangement." - That would meet the case. The Registrar could then take notice of that. But does not your clause here go rather far, because you are saying that there must be some evidence that the petitioning creditor is activated by attempting unduly to obtain something from the debtor?

839. Or from the trustee or any other person. - In other words, an affidavit by the trustee under the deed might be sufficient evidence?

840. Yes. The sort of case I had in mind is one which you probably remember, in which the petitioning creditor said: "All right, I will assent to the deed provided you pay my costs." You think then that the Section would be useful? - (Mr. Russell): Very useful, yes. It is the sort of thing we want to see.

841. I have been a little confused by what you say about relation back in connection with a deed of arrangement. If there are earlier and independent acts of bankruptcy available, do you not think the doctrine ought to apply in the ordinary way? - (Mr. Mahony): If it applies in the ordinary way it means that the trustee under the deed of arrangement still has to wait for three months to let that period expire. Then the attempt to get active administration of the deed of arrangement within one month would fail. It is not just enough to exempt the deed of arrangement from the onus of the relation back.

842. I am not sure if I quite follow. Suppose there is one dissenting creditor: he petitions in bankruptcy, and his petition is dismissed under the Section we have just looked at. That means that everybody has assented to the deed except one person, and that one person has had his bankruptcy petition dismissed. Surely the deed trustee can safely go ahead in those circumstances, can he not? - But that one creditor may still with his petition be able to delay the administration of the deed for three months or more.

843. But supposing his petition has been dismissed? - But that petition will be dismissed probably only three months or four months after the date of execution of the deed.

844. You mean that so long as that petition is on the file the trustee cannot do anything? - Yes. The trustee is tied.

845. I follow your point now. You think that the doctrine of relation back should not in any case go further back than the petition? - Yes. In companies, the relation back of the liquidator's title goes to the date of the petition.

846. Yes, it does, because a company cannot commit an act of bankruptcy and they could not go any further back. - It is not suggested that one should take away the protection of acts of bankruptcy by the debtor, so that any debtor for £50 could be made bankrupt whether he had committed an act of bankruptcy or not. That is not suggested at all. What is suggested is that in order to make the deeds effective the doctrine of relation back should apply at the date of the petition and not at the date of the act of bankruptcy.

847. Mr. Emerson: I am not quite clear yet. Is the point this, that while we have excluded a deed of assignment as an act of bankruptcy for more than one month, there might previously to the execution of the deed of assignment be another act of bankruptcy? - Yes, or a creditor could send out a bankruptcy notice and act independently.

848. But that would be another act of bankruptcy? - Yes.

849. And our provisions as regards deeds of assignment in those cases would be abortive? - Yes, and you are not saving the three months waste of time on administration.

850. Mr. Lloyd Williams: Would not that mean that the debtor had not disclosed all his creditors? - No.
851. Mr. Emerson: We have merely covered one act of bankruptcy, we have not covered the other seven? - Yes. - (Mr. South): We had a good deal of evidence that administration was held up owing to the possibility of a petition based on a separate and independent act of bankruptcy, so that deed trustees do not feel safe to make any distributions at all for three months, and that delay often damages the estate.
852. Mr. Lloyd Williams: He could still recover the assets, could he not, but he should not make any payment? - He should not make any payment.
853. The estate might be damaged if he could not get the assets in, but surely it will not be damaged if he cannot make any payment? - I think that if he wants to run the business, and cannot make payments, that holds him up.
854. Mr. Emerson: We are suggesting in our draft Section 21 protecting the deed trustee. You might like to take a look at that. - (Mr. Russell): I think that is alright but, if the Section is to cover running a business, expenditure, instead of expenses, might be a preferable word. It is really a legal matter, and not an accountants' problem. I think that revised Section does overcome the trustee's difficulty.
855. Chairman: With regard to what you say about the trustee having recourse to the Court, and reporting offences to the Board of Trade, of course you did bear in mind, I suppose, that nearly all the bankruptcy offences can only be committed by somebody who has a receiving order made against him? - (Mr. Mahony): That is so.
856. Then the practical effect of empowering the trustee to make a report of an offence to the Board of Trade would not be very great, would it? - Unless the Deeds of Arrangement Act imported the penalties of the Bankruptcy Act.
857. We have had the suggestion put forward to us, by a very ingenious gentleman who gave evidence some time ago, that if the debtor had been guilty of any misconduct, either before or after the execution of the deed, the trustee could apply to the Court to have the estate administered in bankruptcy. - (Mr. Russell): That is a very ingenious suggestion.
858. It is a very novel idea, and we thought it was a very ingenious one. He had in mind a case in which a man executed a deed of assignment, and then prevented the deed trustee taking possession of his property, and kept off the deed trustee, literally, with a shot-gun. Whether such a case would be received with open arms in Carey Street, we are not quite sure. - I think if it were found that that suggestion could be worked out satisfactorily, it would overcome this difficulty. We should be in favour of it.
859. In principle, you are in favour, subject to the necessary details being worked out? - Yes.
860. I see that you are in favour of a compulsory form of deed of arrangement, or assignment? - (Mr. Mahony): Yes.
861. Does that not destroy the advantage of adaptability, which I thought was one of the advantages of the deeds, at the moment? - It is true that there is a great deal of adaptability. I think you will remember one case where a solicitor drew up a deed of composition, and imported into the deed of composition a clause that the trustee under the composition could, by power of attorney, execute the deed of assignment on behalf of the debtor. Do you remember the case?
862. Yes, I think I do. - And the Judge was very amused, because the trustee could not, of course, make a debtor's affidavit. They could not possibly make the deed of assignment effective, unless the debtor

made a debtor's affidavit, which of course he was not prepared to do. That is, of course, taking adaptability to extremes, but so many creditors will sign deeds of assignment, or sign assents to deeds of assignment which they have never seen, or know nothing about, that it does seem useful to have a standard form. Of course, most of the deeds at the present time are in standard form, printed by Waterlow's, or somebody of that kind.

863. (Mr. Lloyd Williams): They would not read the standard form, would they? - No.

864. Then they would be no better off? - If it were a statutory form, they would be supposed to know it by law. At any rate, there would be a protection there against extraordinary clauses, which at the present time could be put into the deeds by way of fraud on the creditor. It is possible to put a clause into one of these deeds, if they are so adaptable, that could provide for the payment in full of one particular creditor.

865. Is it not advisable that the creditors should read what they sign, before they do it? - Yes. The banks, and other officials, probably do that.

866. Mr. Emerson: You have five different classes of deed? - Yes.

867. It would seem to me that a statutory form would have to embody as many variations? - Yes. Of course, in practice, these deeds of inspectorship and others are almost extinct.

868. One witness uses them frequently. - Yes, where there is administration under the Court.

869. Chairman: It comes to this. You think there should be a compulsory form of deed, and the reason for it is to protect fools from their own folly? - That is what it amounts to. - (Mr. Russell): I think the only way that could be met would be by having certain minimum clauses, which must be in, but I think even that would almost be an impossibility. I do feel that although this suggestion is in our memorandum, it is a case of protecting fools, and the system might be so rigid that the results would be worse than the present state of affairs. There is that danger.

870. I think we are in agreement with the substance of your other suggestions about deeds of arrangement on that Section, so I do not think we need trouble you any further. - (Mr. Mahony): And on all points on the doctrine of reference back, so far as the acts of bankruptcy are concerned?

871. We wish to consider that. Do you want to say any more about that whilst we are on the subject? - No, except that if that is continued, of course, it makes the chance of distributing under a deed in less than three months quite hopeless.

872. The really important thing, surely, is that the trustee should feel that he can safely go ahead and get in assets, so as to make a distribution at the earliest possible moment, rather than that he should make a very quick distribution? - Yes, that is so, and also that he should be able to carry on the business with some confidence.

873. Mr. Emerson: But in practice, would you not agree that to pay the first dividend within three months is the exception, rather than the rule? - It is the exception, but it is possible to do it. I am sure you have done it yourself.

874. Mr. Sherwell: You are really worried about the business being carried on, and the trustee making payments in order to keep the business running? - Yes, and the possibility of the trustee being treated as a trespasser, afterwards.

875. Chairman: I think by providing that he has to have his proper expenses and his reasonable remuneration, that would cover it? - Yes, that would negative that point.

876. May we pass on to Section C of your memorandum? You say that it would be convenient to have all the statutory rules applying put in one Act. Do you think there is any advantage in having a single Act for bankruptcy and deeds of arrangement, as distinct from having two Acts, as at present? - I do not think there is, if you are going to construct your draft Acts on the lines which you contemplate. If, however, you were going to incorporate the provisions of the Deeds of Arrangement Act into the Bankruptcy Act, in the same way as voluntary liquidations are incorporated into the Companies Act, then there might be some point in a consolidation of bankruptcy and deeds of arrangement into a single Act.
877. You speak of statutory rules. You are not referring to bankruptcy rules properly so-called, are you? - (Mr. South): No, we meant the statutes.
878. That is what I thought. I think we should agree that it would be a great convenience if all enactment relating to bankruptcy could be put into one Act, so to speak. - Yes, with preferential debts particularly in mind, I think.
879. We propose to make certain amendments simplifying the position as regards proxies. In fact, we were going to adopt your first and third suggestions, and your second one that the proxy holder should only go on to the committee of inspection if he is in the regular employment of the creditor. - (Mr. Russell): We think that is right.
880. We thought it rather undesirable that a proxy holder or the holder of a power of attorney should go on to the committee of inspection unless he were in the regular employment of the creditor. - (Mr. South): That, of course, would cut out solicitors from acting on committees of inspection.
881. They could have a power of attorney? - Yes.
882. You would draw a distinction between the simple proxy and the power of attorney? - Yes.
883. Have you any suggestions to make as to what could be done the better to prevent solicitation for proxies? - We found that very difficult. The only suggestion which I think we can put forward is a tightening up of the sanctions against it. It does not, by any means, really meet the problem, which is essentially lack of evidence, but if the sanctions, where the offence is proved, were tightened up a bit it might possibly dissuade people from running the risk of being discovered.
884. Would you like to see solicitations for proxies made a criminal offence? - I am not sure about that. I think something like removal from office by the Board of Trade, where solicitation is proved might be effective. - (Mr. Mahony): That applies now.
885. Making it a criminal offence is rather like taking a blunderbuss to kill a gnat? - (Mr. South): Yes. We found this problem very difficult. - (Mr. Russell): If the field of recruitment of trustees, as it were, was confined as we have suggested to certain persons - perhaps to accountants - I think the strongest sanctions then would be the disciplinary sanctions of the bodies concerned, which have been tightened up a great deal in recent years. I think the action taken would be quite strong. A person would be far more prepared to take his complaint to the trustee's own Council for consideration by his own disciplinary committee, rather than starting anything which might involve legal proceedings. As the sanctions which are then available are rather informal, but very forcible, it might be the best way to deal with it.
886. Mr. Beer: I suppose that can be dealt with under the existing law, in respect of members of a professional organisation? - Yes, it could.

887. Chairman: As regards your suggestion about the Official Receiver employing a qualified accountant to help the debtor make out the statement of affairs, and so on, do you want that to go into the Act? - I do not think it can. We feel it is an administrative matter which should be brought before Official Receivers, with some recommendations if possible. The position is unsatisfactory, because we as accountants are very strongly opposed to fees being calculated other than on a certain basis. There is no doubt this practice does occur of people taking work at very out fees, in order to get the work.
888. Our mandate is only to suggest amendments to the Act, and I am afraid that is rather outside our purview. - It probably is.
889. That brings us to this question about the qualifications of trustees, which we were touching on just now. We were proposing to suggest amending the Act, so as to prevent a creditor from being a trustee, which goes part of the way to meeting you. We feel that a creditor could not possibly be expected to act impartially, as between himself and the other creditors. But do you not think there would be quite considerable opposition to your suggestion from various lay men and women who were not qualified to be auditors of limited companies? - I think we can say that almost all accountants, even if they are not members of a professional body, have got a Board of Trade authorisation, and there has got to be a line drawn somewhere. We feel that this would probably be the only place at which a line could be drawn. It is the only place at which there is a comprehensive limitation in the field of recruitment, that is in the Companies Act and the authorisations given by the Board of Trade. I do not know enough about this, but I should not think there is much Trustee work done other than by the members of the recognised accountancy bodies.
890. Mr. Lloyd Williams: Do you really think this suggestion would get through Parliament? - Of course, the profession is so badly organised; that is the trouble. We are hoping it may be better organised in the not too distant future, but at the moment it is badly organised, and this is the only real protection we have. I am not going to deny that some of the most repugnant practices in this field of work - although it is frightfully hard to pin them down - do not come from the members of the organised bodies. They come from some unfortunate, rather backward brethren, who are often members of the recognised bodies. We must recognise that.
891. You must clean up your own stables, must you not? - That is no doubt the right thing to do, but it is very hard to find the evidence. We have tried, and when we do find it we take strong action.
892. Chairman: Of course, the legislature tends, does it not, to pass legislation of this type, unless it is clearly satisfied that the actions of the unqualified persons you want to exclude are harmful in themselves? - Yes.
893. As, for example, unqualified doctors, dentists, or midwives. Those are the sort of people it goes for? - Yes.
894. Is there any real evidence that the few laymen who obtain jobs as trustees do any harm by doing that, except that they are excluding accountants from earning a living? - I think that where harm is done, it is often done by that particular type of person. As I said before, it is not confined to that type of person, but there is a further factor at present that if we, through our disciplinary committee, remove from membership a person who offended, he would still be qualified to take on these appointments, so to some extent our action would be nullified.
895. If he had been removed by his professional tribunal, because of his conduct, I should have thought the Board of Trade would not certify him as a fit person. Do you know of any case where that has arisen? - I know of a case where a man resigned, when he saw the threat coming, and he still continues to flourish, but he was not removed forcibly. Of course, one cannot legislate for the exception.

896. Mr. Beer: Under the Companies Act at the present time the vast majority of companies are exempt private companies, and of course there is no qualification whatever required there? - Unfortunately, no.
897. A man can be a bank clerk, or an ex-income tax inspector. Equally, of course, there are fields of enquiry - income tax, for instance - where it may be that the Inland Revenue may say that the man who was unqualified did his job very much better than some of those who were qualified. - That is so. It is really the profession's own fault that the situation exists, and we recognise that. - (Mr. Mahony): I think Mr. Russell's point was mainly in relation to touting for appointments as trustee. And that touting is more available to people who are not members of the recognised accountancy bodies, because the recognised bodies have the disciplinary powers.
898. Chairman: In other words, the strongest case for your suggestion is that it would facilitate the putting down of touting? - It would, yes. It would also help on investigation, because, although a great deal of the practice in bankruptcy is concerned with the knowledge of the law, the essential quality of a trustee is having a capacity to investigate, and that capacity to investigate is part of the accountant's training. You find many of those people, who are secretaries of associations, and that sort of thing, who are not qualified accountants at all, and they are quite incompetent so far as investigation is concerned. In fact, they have to employ accountants from outside to do that part of the work for them.
899. Mr. Peirce: It is a fact that secretaries of associations act in that capacity? I have never heard of one. - In some cases they have done.
900. I have never heard of one. - I think there are several.
901. Mr. Lloyd Williams: And the accountants seem to benefit, because they are called in to put the matter right? - I think they are often made use of. - (Mr. Russell): I think it is not only a matter of the accountants benefiting here. We are very ashamed of the practices of some of the members of our bodies; we know them, we know the practices, and we can name the people, but we just cannot find the right way to stop it. That is the crux of it, to be quite frank and honest.
902. Chairman: You would like to see these people stopped from being trustees, because then you would not have the trouble of proving facts against them yourselves? They are inside your bodies? - They are members of the recognised bodies, but the touting, for instance, is done by employees, who are not members of the recognised bodies, and the touting is denied by the principal. That is a common feature of this particular field of work.
903. And it is very, very difficult to prevent? - Very difficult indeed.
904. Mr. Lloyd Williams: Surely, without any clear evidence we could not make a recommendation of this kind, could we? - I do not think you can.
905. If the suggestion went as far as the floor of the House, you would want absolutely clear evidence before the Members would consider it? - Yes.
906. Chairman: Shall we go on to the committee of inspection? We were proposing to make the Section about filling vacancies in the committee of inspection permissive and not mandatory. That would just about cover your first point, would it not? - (Mr. Russell): It would entirely.
907. Mr. Emerson: We have had a suggestion that a resolution of the committee of inspection, signed by all the members through the post without convening a meeting, should be binding. - (Mr. Mahony): It would be of very great assistance. It would be most helpful.

908. Chairman: It would have to be unanimous? - Of course. When a case gets very old, it is almost impossible to get a full meeting of the committee of inspection, because by then the members have lost interest.
909. It has been suggested to us that, in addition to his expenses, a member of the committee of inspection should be entitled to a small sum by way of remuneration for attending the meeting; such a sum as a guinea or two guineas has been suggested. Do you think that is a good idea, or not? - (Mr. Russell): For attending each meeting?
910. Yes. - On the whole, I think it is equitable. I think it is a good thing. After all, these people are giving their time for the benefit of the general body of creditors, not only themselves, and provided the fee is so small as not to make it capable of being mis-used, I think it would be a very good thing.
911. Would you agree? - (Mr. Cooke): Yes. - (Mr. Mahony): I think it would encourage the members to come to the meetings. - (Mr. Russell): Of course, I do think there should be a limit. I think a guinea or two guineas is ample. - (Mr. Mahony): I think it should be a guinea.
912. The witness who put this forward said that he gets a small sum for serving on a jury, so why should he not get a comparable sum for attending the committee. - Yes. It can involve travel and loss of time.
913. He gets his expenses? - But not for time spent in travelling.
914. Mr. Bear: Some witnesses expressed the view that the guinea, less income tax, would not amount to very much, and would not really be an inducement. - (Mr. Russell): I do not think it would be an inducement. I think it would be justice, it would be fair, and that is really the more important thing.
915. You would not use it as a bait to get a man to come to the meeting? - No, but if I were a trustee I should feel far more inclined to ring up a man and say "When can you come? You must come", if I were going to pay him a guinea or two guineas for coming, than if he were coming out of the goodness of his heart.
916. Mr. Lloyd Williams: It would strengthen the position of trustees? - I think so.
917. Mr. Peirce: And you would get more attendances? If you do not get more attendances it fails? - Yes.
918. Chairman: If it were limited to such a sum as a guinea, less income tax and possibly surtax, you do not think it could possibly cause a multiplicity of meetings? - (Mr. Mahony): I would not think so. The trustee would not want to waste his own time. - (Mr. Russell): I suppose that everything is capable of abuse but I think it would have to be a very exceptional case.
919. Is there any doubt whether a company can serve on a committee of inspection through a duly appointed representative? I have not had time to look up this case? - (Mr. South): I think that there is. There seems to be a doubt left in that case, and if there is a doubt it might as well be resolved.
920. I do not think there is any trouble in practice so far as I know. As regards paying out of pocket expenses of the committee of inspection members, I do not see why you want to make a differentiation in the case where a local bank is used. Does the trustee have to make an application to the Inspector-General, where he has not got a local bank account? - (Mr. Mahony): It applies in both cases. He has to in all cases. - (Mr. Russell): I think the suggestion which was put forward there was that where there was a local bank account in use it should be permissible to pay the expenses out of it. However, it seems to be a very unimportant point, really.

921. There is not any great difficulty? - No. - (Mr. Mahony): In practice, at the present time, the Board of Trade is able to see that the committee of inspection are being paid their expenses, because of the application for the cheques through the Board of Trade, but they would not know if a local bank account was being used. They would not have the knowledge that the committee of inspection were being paid. I think that was the purpose of the present provision.
922. If monies were being paid away improperly on fictitious expenses, the trustee would soon get into hot water? - Yes, the Board of Trade would pick it up at the next audit.
923. I gather that it is not a matter to which you attach any great importance? - (Mr. Russell): No, it is quite trivial.
924. That brings us to the preferentials. Have you any views about rates and taxes, in that connection? - Yes. We went into the question of rates and taxes very thoroughly, but we felt there was so little hope of the present legislation being amended that it was hardly worth our while to put forward the rather voluminous and conflicting ideas which were submitted. We did feel that the present rights should be limited, so far as taxes were concerned. Of course, the recent amendments to the legislation do help to some extent, or they have an effect to some extent in that terminal losses can be dated back. That helps, but we do feel that the rights might be limited to the year preceding the date of bankruptcy. If a form of words can be found, that seems to us to be a logical restriction to impose.
925. I gather that you would really rather see the tax preference abolished altogether? - (Mr. South): There was a good deal of opposition expressed, but the Council came to the conclusion that it was not really fair to abolish altogether the Crown's preferential claim to taxes. They would like to limit it.
926. Does the unfairness lie in the fact that the Crown's services have very largely to be rendered to the insolvent, as well as the solvent? - (Mr. Russell): The objection is to their being able to pick and choose. A few years ago their files were so much in arrears that liabilities going back four or five years would suddenly come up. We felt that if a creditor is neglectful in pursuing his claim he should not have all the rights to pick and choose.
927. Mr. Lloyd Williams: But the Revenue do not choose their debtor, do they? - No, but they do choose their years, and those of us who are in practice do know that in the period of shortage of staff, which I agree was exceptional, the Revenue did get into some rather bad tangles with arrears, and people were allowed to go on far too long accumulating tax liabilities.
928. That does not seem to be the position today, does it? - We do not find it in our own experience, but I think it applies in some cases. The number of such cases is still rather remarkable. What happens is that there may be a question of doubt as to whether a particular sum of money is taxable, and quite a lot of correspondence goes on. The correspondence may go on for years, and that file gets put on one side and it is neglected while the assessment is being resolved. While that sort of thing is going on we think it is wrong that the Crown should still have the rights of selection.
929. You would like to limit them to the last year? - Yes, if the last year seems logical.
930. That would not apply to rates, because that is the last year, of course? - Yes.
931. Mr. Sherwell: Why do you think this preference should not be abolished altogether? - It is so deeply rooted.

932. Not only in the Bankruptcy Acts, but elsewhere in common law? - Yes. It is so deeply rooted that it has got to be accepted, rather than examined to see if it is equitable. I suppose that in some ways it is not equitable.

933. Mr. Lloyd Williams: You are speaking as a taxpayer now, not as a member of the Council? - Yes.

934. Mr. Emerson: If you limit them to the year preceding the receiving order, you are probably washing out their preference anyhow? - Probably.

935. Mr. Sherwell: If anything like that were accepted, I suppose it is possible that the Revenue would not be so keen to allow us credit, as they do at the moment. At the moment, I think they are pretty generous, but they may be different if you abolished that preference altogether. - I think another factor to be borne in mind in this question is the matter of back duty. We know that some bankruptcies do result purely from back duty cases; cases where there has been fraud on the Revenue by a taxpayer, and liabilities are discovered extending over many years. If you did limit the Crown to one year's preference in those cases, you might be restricting them unfairly. On the other hand, generally speaking, in a back duty case the Crown takes most of the money anyway, because the liabilities are predominantly large in the liabilities of the particular bankrupt, but there is that aspect of it which we feel should be taken into account, if you are considering this question fully.

936. I should not think he was protected in any case where there is fraud, because a man cannot take advantage over a fraud. - We are not suggesting he is protected. Let us take the case of a trader who has £5,000 of ordinary trade liabilities. It may be found that he has defrauded the Revenue out of £20,000 over a period of perhaps 15 or 20 years, and they can recover by the threat of penalties for fraud. They can recover very large sums, and that might be very unfair in its effect on the other creditors.

937. Chairman: I certainly do not feel they should be competing on anything like equal terms with the other creditors, in respect of treble taxes plus penalties. - No, that is what we felt.

938. Mr. Lloyd Williams: If they were limited to the last year, they would make use of their criminal powers, which may be a very good thing? - A very good thing, indeed. We accountants would like to see more use made of criminal powers in these cases. - (Mr. South): I think the Council would favour that.

939. Chairman: I think we must break off here. I understand you could come on Wednesday. - (Mr. Russell): These three gentlemen could do so, but unfortunately I have to be down in South Wales.

940. We shall miss you. I think it will be convenient to break off there, and not try to do too much tonight. We are all very much obliged to you for your attendance, Gentlemen, and I hope we have not kept you too late. We will meet again on Wednesday at 4 p.m.

(The proceedings were adjourned)

Wednesday, 13th June, 1956

Present

HIS HONOUR JUDGE BLAGDEN (Chairman)
 MR. C. E. M. EDMERSON, F.C.A.
 MR. H. LLOYD WILLIAMS
 MR. H. E. PEIRCE, O.B.E., J.P.
 MR. B. E. P. MACTAVISH (Joint Secretary)

MEMORANDUM SUBMITTED BY THE
SOCIETY OF INCORPORATED ACCOUNTANTS
 (For Society's written evidence see page 124 above)

EXAMINATION OF WITNESSES

Mr. Daniel Mahony, F.S.A.A.	} Representing the Society of Incorporated Accountants
Mr. Arthur John Cooke, F.S.A.A.	
Mr. Terence Wilton South	

941. Chairman: I understand, Mr. Mahony, you wanted to say something more in connection with the matters we discussed last Monday? -

(Mr. Mahony): There was one point which dealt with the question of undisclosed creditors in deeds of arrangement. Even though you take away, as you suggest, the taint of the act of bankruptcy from the deed of arrangement, there still is the risk that there is an undisclosed creditor who could come forward at any time within three months of an act of bankruptcy, and that he might sue after the deed and so upset the deed of arrangement. What I was hoping you might consider was that a form of advertisement could be put in by the trustee which would protect him against any creditor of that description.

942. You mean he should put an advertisement in the local paper? - He should advertise in the "London Gazette".

943. The trouble about the "London Gazette" is that nobody ever reads it. - The general papers would take it up, and the trade papers.

944. They would republish the entry? - Yes.

945. What you are saying is that it is not a question of a deed being an act of bankruptcy but that the concealed creditor might serve a bankruptcy notice on the arranging debtor, get a petition within three months of the deed, and say: "I will have nothing to do with the deed, I am going to put the man into bankruptcy"? - My point is, would it not be helpful in such a case if the trustee had already advertised for claims, and this claim had not been put in within the time stipulated in the advertisement.

946. We are very much obliged to you, and we will give that matter careful consideration. - The other point I wanted to deal with is relation back in general, but I think we will be discussing that later.

947. Yes. You deal next with wages and salaries. - (Mr. Cooke): That is a matter which gives us a great deal of trouble. I know Mr. Mahony will bear me out when I say that one of the most difficult things is to refuse to pay these claims to employees who urgently need money and probably will have to wait years. I think if our suggestion that they should be

made pre-preferential was adopted it would ease that position very considerably. I have had many very awkward and stormy interviews with these people and it is a matter of considerable embarrassment, which I think we could overcome by making them pre-preferential, so that we could pay them without waiting to settle such things as the tax liability.

948. In most cases I fancy it is only one week's pay that is involved? - Normally; although that is bound up with the second point, loans to pay wages. That, however, is another matter. Normally it is, as you say, a week, except for the salaried people, when it is up to a month.
949. I was thinking of the actual workman. - It is normally not more than a week for him.
950. He is only out of pocket to the extent of one week's wages? - But it often means a very great deal to him. - (Mr. Mahony): It is a question of having to dismiss employees on a Friday night and tell them that there is no money; if you had to do that you would realise how awkward it is for the trustee. You have these people saying that their wives have nothing with which to buy the Sunday dinner. If one were able to go to a bank and borrow the money immediately to pay the wages it would be a very great blessing.
951. Would you be in favour of putting any sort of limit on it - a limit of not more than a fortnight's wages, or £500 (in the aggregate), or whatever your suggestion is? - I think you might come up against the political angle there; because I understand on a previous occasion a smaller amount than the £200 limit was suggested and Parliament forced the amount up in the interests, as they thought, of the workmen.
952. That was not quite my point. Your proposal, as I understand it, is that no matter how many of these workmen there are, and no matter how high the wages payable to each, it would all become pre-preferential? - That would be so; but in practice it is likely not to be more than one week's wages.
953. And I suppose as a general rule in bankruptcy there are not a great many workmen? Most workmen in really big undertakings are employed by limited companies? - That is so.
954. Mr. Lloyd Williams: Would it not seem reasonable to limit it to a week's wages? - (Mr. Cooke): It is rather narrow, a week; a fortnight or three weeks' would be more reasonable.
955. I should have thought a week's wages would have got over the hardship? - (Mr. Mahony): An amendment to make one week's wages pre-preferential would be of very great assistance.
956. That would prevent any undue hardship? - Yes.
957. Mr. Peirce: From your own experience, is it a thing that happens frequently? - Yes. - (Mr. Cooke): The bank does not obtain a refund of the money in bankruptcy.
958. Mr. Emerson: The onus really falls on the Official Receiver, not the trustee? - Yes, except under deeds. In most cases where there are employees, the matter is generally dealt with by deed in the first instance; bankruptcy might follow.
959. Chairman: In regard to your suggestion of introducing the subrogation provision for loans to pay wages, what we had thought so far was this, that the position in companies was very different; there is no such thing as trading after knowledge of insolvency. - Yes; but if the directors have knowledge of insolvency, the knowledge of the directors is the company's knowledge.
960. When it comes to an application for discharge, one of the more important facts is trading with knowledge? - Yes.

961. To make the bank or any other person who advances money to pay wages preferential, it seemed to us, is to tend to encourage trading with knowledge of insolvency, or rather to encourage people to aid and abet trading with knowledge. - On the other hand, there is the hardship on the trustee or Official Receiver of dismissing these employees; whereas perhaps if there were at least one week's wages pre-preferential, or even a month, the trustee could borrow the money from the bank and pay the wages.
962. Surely if the trustee is going to borrow money from the bank, the bank would be entitled to look to the trustee to repay? - The trustee would not have any power under the Act to borrow money in that way.
963. We might consider giving him power to borrow the necessary money to pay wages; but what I was rather deprecating is the idea that the bankrupt should be entitled to borrow money to pay wages and the person who lends him that money should then be entitled to stand in the shoes of the receiver of the wages, in view of the 'trading with knowledge' Section. We felt that was rather like providing that the burglars' mate should have the first charge on the swag. - And indeed in companies that particular Section works in a very unsatisfactory way sometimes. The effect of it very often is to relieve the bankrupt himself, or the bankrupt's friends of the securities which they have lodged with the bank. I have a case at the present time where a director has put his wife's property in as security to the bank, and the bank has given an overdraft of £4,000. The wages provided by the bank have accumulated to £1,500 over 17 weeks, and the bank are now claiming £1,500 for subrogated preferential wages, which will go in relief of the security lodged by the director's wife.
964. Mr. Emerson: That cannot apply in bankruptcy? - No, subrogation of this kind does not apply in bankruptcy.
965. If a certain amount were made pre-preferential, the trustee can immediately pay that money himself, knowing it would not be disallowed? - He could borrow the money, provided he knows that there are enough assets to cover it. - (Mr. Cooke): It also arises where you have assets which need certain work put into them to make them more saleable; and if you cannot do that you would have to sell them for scrap, but very often a small expenditure on wages would put that right.
966. Chairman: What it really comes to is that you think we should make at any rate a week's wages pre-preferential, and give the trustee express power to borrow for the purpose of paying pre-preferential wages? - (Mr. Mahony): Yes.
967. You mention the case of the loan by the wife or husband for the purpose of paying wages. The relation between spouses does not make any difference - whatever the position as regards the bank, the wife or husband should be in the same position, I suppose? - Yes.
968. Do you want to make travelling and similar expenses also pre-preferential to the same extent as wages? - (Mr. South): Yes, but it is not an important recommendation. It was mainly directed at trying to ease the trustee's task in administration a little bit.
969. On the whole, do you not think there are quite enough preferentials already? - (Mr. Mahony): Yes.
970. Mr. Lloyd Williams: If you bring in travelling and other expenses you are opening the door, and there will be no limit? - (Mr. South): The intention was to try to save analysis of the wages payments to pick out which part of the payments is on account of wages and salaries and which might be on account of reimbursement of expenses, if the employer has been accustomed to do this.
971. Chairman: You are not really very keen on that? - We do not press it.

972. That brings us to what you say about the claims of public utilities. You say you find that there is resentment about the attitude they are able to adopt. May I ask whether you share that resentment? - (Mr. Cooke): Yes, I think they do blackmail the trustee; they do, in fact, form themselves into pre-preferential creditors. They will not let you have a supply until you pay the existing debt.

973. Would it be enough to provide somewhere in the Act that the trustee should be deemed a new customer? - (Mr. Mahony): That would be excellent.

974. Or a new tenant? - (Mr. Cooke): There is a snag there, because there is a case I knew where they gave the trustee a new contract, but they inserted into the contract a clause that he should pay the arrears and got round it that way. They treated him as a new tenant on the condition that he paid the arrears.

975. Mr. Emerson: But that is not enforceable? If he signed the contract he would be liable, but he should not have signed that sort of contract? - They are entitled to make a new contract.

976. Chairman: I think it would meet that sort of thing if we said the trustee shall be deemed to be a new customer and it shall not be open to the authority to demand payment of the bankrupt's arrears as a condition for supplying the trustee? - (Mr. Mahony): Yes. That should apply to trustees under deeds as well.

977. Mr. Lloyd Williams: One must bear in mind that these public utilities have got their rights as well as their obligations under Acts of Parliament, and it may be the Act under which they are governed compels them to go for these arrears. The only thing we can do then, is to over-rule these Acts by saying that, notwithstanding anything in any other Act contained, the trustee shall be treated as a new tenant, without any demand for arrears. - (Mr. South): I have looked at one or two past Acts on this; unfortunately I have not had time to go through the whole history, but the past legislation on which these utilities often rely seems to be rather a jumble. There are a great many public and private Acts drawn up, in rather differing terms sometimes, and I think it means a good deal of caution will have to be exercised as to how the clause is drafted; but I think the wording you suggest would cover it.

978. Chairman: We would have to consider the wording carefully, but no doubt something of the kind ought to be put in. - (Mr. Cooke): Yes, so that the other public utilities treat the trustee in the same way that the Postmaster General treats the trustee as a new subscriber for the purpose of the telephone; he does not insist on the arrears being paid.

979. I do not quite follow the point you make about loans by the wife to the husband, or husband to wife, being deferred. At present the Section is limited to loans for use in the business. - (Mr. Mahony): Yes, to be used in the business; but the money may have been used in the business but borrowed for some other alleged purpose which is not carried out. I had a case where a wife lent money to her husband for the purpose of paying some settlement that was due to a daughter, and that was held not to be a loan for the purpose of the business.

980. Is that not as it should be? - In fact the daughter had lent the money, the settlement money had been absorbed in the business by the husband already, and he was merely giving back what had already gone in.

981. He pinches the daughter's money? - Yes, in effect.

982. He uses it in his business and loses it; the wife then lent him the money in order to repay the daughter? - Yes, that is the kind of thing that happens.

983. And you say, in that case why should not the wife be treated on a level with other creditors? - Yes. I brought an action against the wife in that particular case and she won.

984. Mr. Lloyd Williams: In that type of case there is no earthly reason why that payment should be deferred; she is in the same position as any other creditor? - Indirectly the money was lent for the purpose of the business, because the business had already had the benefit of it.
985. Chairman: Surely in that case her real purpose in advancing the money was to get the husband out of the hot water in which he had got himself? - Yes, apparently not for the purpose of the business at all; she succeeded in enforcing her claim in the bankruptcy and was not held to be a deferred creditor.
986. Mr. Lloyd Williams: The fact that the Court did not agree with you rather defeats your argument that all such debts should be deferred? - No, they were interpreting the law as it is at the moment, namely that only loans for the purpose of business are deferred.
987. Chairman: I do not quite see why you want to alter that. - Because it leaves a gap for the dishonest husband of a dishonest wife to fake up some kind of claim that is going to make the loan appear to be not for business purposes.
988. There is one other point here. You draw attention to the wife's right to occupy the matrimonial home when the parties have separated. That would seem to us to be just one of the ordinary incidents of property. Do trustees either in bankruptcy or under deeds suffer very much in consequence of it? - That is a very new point; it arose in Court only during this last year, and we were not clear about it. - (Mr. South): It could affect the sale of the property.
989. I do not see that the trustees in bankruptcy can expect to have all the plums and none of the crumbs. If the property is encumbered by his wife you must deal with it as best you can. You would not press very strongly for amendment of the Bankruptcy Act to deal with that? - (Mr. Mahony): We merely hoped you could clarify it in some way.
990. That brings us to the vexed question of fraudulent preference. We were proposing to provide that, for a period of say 21 days before the petition, any payment which in fact resulted in a preference to the creditor could be set aside. - That would be a help, but really the point that has troubled us so much is connected with a ruling in the Gresham Trust case. I remember that up to 1935 I had many cases of fraudulent preference and they were comparatively easy to prove.
991. You could rely on *Re Cohen* in those days, that was a very great help? - What we were hoping was that you might be able to put the position back to what it was before the Gresham Trust case.
992. Restore *Re Cohen*, in other words? - Yes. The trouble I think was that the Gresham Trust case required, not in so many words but in practice, that the bankrupt should be called as a witness.
993. And he is unlikely to be very helpful? - If the trustee has to call him as his witness, because the onus of proof is on the trustee, the bankrupt is of course almost certain to take a line in opposition to the trustee, and the trustee cannot prove his case.
994. Because the bankrupt is not likely to be willing to help in stultifying his own transaction? - Yes.
995. Your suggestion that the trustees should be allowed to read the notes of the public examination is rather a wide one. After all, the unfortunate preferree has no right to attend the public examination and questioning of a bankrupt unless he happens still to be a creditor? - Yes.
996. That is really giving evidence against the unfortunate preferree which he has had no chance to deal with? - He could call the bankrupt as his witness in reply to that evidence in the motion to set aside the

preference, and that then would put the onus on to the referee of calling the bankrupt to prove that it was not a preference.

997. If it were provided somewhere that the trustee could read the notes of the public examination, provided that the bankrupt was called and subjected to cross-examination by the referee, that would meet it? - Then you are putting in the bankrupt's statement as evidence-in-chief for the trustee. Does not that again make the bankrupt the trustee's witness?

998. Yes, I think it does; but it creates a position which is similar to the ordinary position on a bankruptcy motion, that it simply means that the notes of the public examination are treated as an affidavit by the bankrupt. - You can of course read the notes of the public examination, can you not?

999. Not as evidence against the referee. That is one of the difficulties. I was thinking that perhaps it would not be unfair to the referee that the notes should be read, provided that the bankrupt was called and he, the referee, had a chance to cross-examine him. - And also that there could be a right of cross-examination for the trustee.

1000. He has had the right to cross-examine on the public examination, when the notes came into being? - Of course if the bankrupt goes into the box, as things are at present, the trustee's counsel can put the notes of the public examination to him.

1001. He could if he was called as the other party's witness. There is a decision that anyone can cross-examine the bankrupt, irrespective of who calls him. - If that were clear in the law I think it would solve the problem.

1002. There is no harm in making it clear if it is not clear already. In the rare case that does happen, if the bankrupt has died between the date of public examination and the date when the motion comes along, the trustee might be in a difficulty, but that cannot be helped. - You would not consider our alternative, that is, that the matter should be decided from the general circumstances of the case?

1003. I think that would be a very good idea myself, and we will certainly consider it. - On this 21 days, if I might go back to it, it occurs to me that questions might arise because it is retrospective, and all these regulations that are retrospective cause difficulty.

1004. I think we should want to reconsider our protective subsection, quite frankly, because not only should the bankrupt be able to get bread and other necessities of life during those 21 days without the baker being called upon to enquire, but also I think he should be able to pay money to the credit of his account without the banker being called upon to enquire, and to make payments out of it without the banker being called upon to enquire as to their propriety. I do not see why, where a banker has acted perfectly properly in the ordinary course of banking business, when a bankrupt makes a payment in order to prefer his aunt who has guaranteed the overdraft, the risk that the aunt should have become insolvent or fled the country should rest on the unfortunate banker. On that we thought of simply restoring the rule as Mr. Justice Eve thought it was. - (Mr. South): Yes, I think that meets it exactly. - (Mr. Mahony): There is a thought which occurs, namely that the surety may have deposited some securities with the bank and then, if the banker is freed, the surety is freed, and the securities are freed. If the bank could be made to hold the securities until such time as the trustee says: "I am making no claim" then the estate would be protected.

1005. That is rather difficult if you think of what happened in *Re Conley* - the two ladies swooped down the minute the account was out of the red and said: "Give us back our securities" - the banker has got no option but to do it. He could, I suppose, provide in a memorandum of deposit that he should be entitled to hold them for three months, but that may not

be nearly enough as we do not know how soon or how late the trustee is going to bring his proceedings. - If you are going to release the bank the security deposited by the third party will have gone and the trustee loses the benefit of the security held by the bank in respect of the preference if the preference can swoop down and collect their securities.

1006. We propose expressly declaring that the guarantor is to be liable and not the bank. - Yes, but the guarantor has got his securities, which he is probably able to turn into cash and secrete.

1007. But why should the risk of that happening rest on the unfortunate banker and not on the trustee? - I would entirely sympathise; but where there was a swoop of that kind and there was some evidence of insolvency, then some onus might be put on to the bank to hold the securities until the trustee released them.

1008. Do you think that is really practicable? - It would be, if there were insolvency, known insolvency; particularly if the bank knew that there was any kind of financial difficulty.

1009. Mr. Emerson: How could the bank be put on guard? - The bank manager generally suspects something if he is giving a fairly large overdraft and some money comes in from book debts or from some normal business source, and it goes to the benefit of the guarantors.

1010. The money would continue to flow in, but payments out would cease? - Yes, that is what does happen. But if the bank knew that here was a case where money was coming in and the normal payments had stopped going out, I think it would not be a hardship on the bank to be held liable.

1011. Chairman: We have not yet had oral evidence from the Institute of Bankers, and I would be interested to hear what their views would be on your suggestion. - These cases are very difficult. It is so easy for sureties to get away with their securities and leave the trustee and the other creditors in the air.

1012. Mr. Lloyd Williams: But you are throwing an awful burden on the banks? - No worse than they have at the moment; at the moment a bank is liable for a fraudulent preference, if they take money in in reduction of the overdraft within the period of fraudulent preference. If the overdraft is reduced by reason of debts being collected and no payments being made to creditors, and there is no pressure by the bank, there is *prima facie* fraudulent preference on which the bank at the present time is liable to refund to the trustee.

1013. Does not your suggestion mean that in every single case where there is a guarantor's security, they are going to have to hold the security for an indefinite period before they release it? - If there is any suspicion of fraudulent preference, then I think it would be perfectly fair, and a much lesser onus than is at present on the bank, to hold those securities, until the trustee releases them.

1014. Mr. Peirce: The bank would play for safety all the time, and the thing would become unworkable? - The person who ultimately pays is the guarantor, which would be perfectly right. If you are going to release the bank from any kind of liability in respect of fraudulent preference and go directly on to the guarantor, the bank are getting a very great advantage, and it would be very little to ask them to retain the securities at any rate until the trustee is satisfied that he has no claim for fraudulent preference.

1015. Chairman: What is to happen if they say they are going to hang on to the securities because they have got certain suspicions about the principal debtor and their own customer's solvency; the customer is going promptly to issue a writ against them - Yes, the customer could issue a writ.

1016. Mr. Emerson: At the time the bank had these securities there may have been no insolvency? - In that case the bank would have a defence against the trustee. What I wish to make clear is that, from the unpaid creditor's point of view, it is the proceeds of the sale of his goods which the bankrupt has used for reducing the bank overdraft and releasing the surety. The bank is the only person who has the means of retaining the security. If you release the bank on the ground of hardship, that hardship which now falls on the bank would in a measure be transferred to the trade creditors.
1017. Chairman: The next matter you deal with in your memorandum is the question of remuneration of trustees. You suggest that the trustee should be remunerated on a time basis in certain cases? - (Mr. South): Yes.
1018. What would you say to allowing the committee of inspection to fix a lump sum? That is what happens in practice? - (Mr. Mahony): Yes. In fact they fix a lump sum and then it is converted into a percentage; that is really what does happen.
1019. Some people think a time basis would lead to excessive remuneration and uncheckable remuneration. I do not know what you feel about that? - It could do. It depends upon the efficiency of the trustee.
1020. And the inefficient man who takes a long time in doing anything would get more than the efficient man? - That is so.
1021. Have you any specific wording in mind as regards Section 82(5)?
You say you would like the Board of Trade to consider whether it could be strengthened. It seemed to us just about as emphatic as it can possibly be at the moment. - (Mr. South): We have not any specific wording in mind. It is an ever-present problem and we wish we had some sharper weapon to attack it. But the real difficulty is lack of evidence to bring home these offences to people and it is extraordinarily difficult to suggest any rewording of the Act which would be any more effective than it is now. I do not know if it would be worth adding some specific sanctions to that subsection, but it would be rather in terrorem than anything else.
1022. Or perhaps one should say *brutem fulmen*. Do you feel the delay caused by the compulsory use of the Bankruptcy Estates Account is very substantial? - (Mr. Cooke): No, I think it means a lot of extra paper work - that is our main objection. - (Mr. Mahony): And creditors are very critical about a cheque taking a fortnight or so.
1023. It is only a matter of a fortnight? - Yes. Really the main objection comes from the creditors; it takes so long to get the cheques through. As a matter of fact in a case of extreme pressure the Board of Trade are very helpful and will issue the cheques within a few days on the position being explained.
1024. In special cases? - Yes.
1025. It is not a matter you would attach a very great deal of importance to? - No. - (Mr. South): It would mean more easy administration, that is the only point.
1026. We are in agreement with you in the first thing you say about deceased insolvent's estate, that something ought to be done to deal with the case where there is not a personal representative. - We have had a specific example by a member since we sent our memorandum.
1027. In the new Section 130 (2) we have included a provision giving the Court power to dispense with service altogether, if there is no known legal personal representative of the deceased person. - That would be excellent.
1028. You have noted that Sections 42, 43 and 44 are inapplicable to Section 130, but they are all in Part II of the Act, are they not? - Yes, but the point is made in the last edition of Williams on Bankruptcy.

1029. We must consider that; there is no reason logically why these Sections should not be applied to the estate of a deceased insolvent, except by the very fact that because the man is deceased you might have difficulty in proving fraudulent preference. - On this there is another point I would like to leave with you, if I may. We did not go into Section 42, because the very fact of the death of a bankrupt may have caused a vesting of interests under settlement which would perhaps make the application of Section 42 in a deceased insolvent's estate very difficult to work out.
1030. The mere fact that it might be difficult to apply the Section is no reason why anybody should be debarred from applying it? - No.
1031. The next thing you deal with is the very interesting suggestion of a register of undischarged bankrupts. As I understand it you can now, at this moment, if you like to go to an office in Carey Street, find out quite easily, for example, whether a particular person has been adjudged bankrupt, and if so whether he has had his discharge granted. - (Mr. South): Yes.
1032. What further information do you want to have registered? - According to what our members have told us, one of the main things they are complaining of is a change of name after adjudication. Keeping track of changes of name was a large part of the difficulty.
1033. The mere provision of a register would not deal with that? You would have to provide somewhere that the bankrupt would be under an obligation to register any change of name, and I think we would have to make it a bankruptcy offence to fail to do so? - Yes. In the last paragraph on this page, about the middle of the paragraph, there is a sentence which reads: "Bankrupts should be under an obligation to notify any changes of address or of name (by whatever process)...." and that was where we were getting at the change of name problem.
1034. Including the case, of course, of the unmarried female bankrupt who marries while she is still undischarged? - Yes.
1035. I do not think that often happens, but it might. - Yes, we had that in mind too.
1036. Do you think the bankrupt's name should be removed from the register when his discharge becomes fully effective? If he merely gets a discharge ought not the public to know that he has been a bankrupt? I should agree to the name being removed if you had said "If and when his bankruptcy is annulled." - I do not think we thought of that point. It had seemed to us when he got his discharge he should not be pilloried in this register any more. That I think was the thought we had in mind. But there may be something in the point that the public should be warned that he has been a bankrupt once.
1037. I should have thought, if you wish to find out about Thomas Jones, and Thomas Jones has at any period in his life been a bankrupt and not had his bankruptcy annulled, you should be able to find that out? - Yes. There is one further suggestion I have had, since we submitted this memorandum - I have not worked it out properly, I am afraid - that is, should there be any connection between the Register of Business Names and the Register of Undischarged Bankrupts? You could go now to the Register of Business Names to check on whether somebody you are dealing with in business is using a business name, and in order to find out who is really behind that business name; but you would want to try and link that up, possibly, with whether he is an undischarged bankrupt or not; so the thought was put to me, would it be convenient to combine it with the Register of Business Names in some way?
1038. It is difficult to see how it could be done. You could make the person who is in charge of the Register of Undischarged Bankrupts notify the Registrar of Business Names in the case of every person he registers, so that the Registrar of Business Names would then write against

any particular person simply the letters UDR. It is an idea that is worth considering, if we had any brief to alter the Business Names Act - but I am afraid we have not. We will go on to your Section D. I think we are all in agreement that unnecessary differences in procedure in bankruptcy and companies winding up are to be deprecated; but we felt that it is not to be assumed that the procedure in companies winding up is necessarily better. - No.

1039. And also that there must be some differences, just as there must be some difference between surgery and veterinary surgery, as you are dealing with different classes of animal. I see your suggestions include modifying or abolishing the doctrine of relation back in bankruptcy. - (Mr. Mahony): Modifying to the point of making it apply at the date of the petition.

1040. Do you not think the long settled right of relation back in bankruptcy, as it stands today, is very valuable to creditors? - It can act exceedingly unfairly and unjustly. I can give you an instance, a reference in fact to a case in 1926. The records are still on the file of the Court. It was the case of Jackson - Louis Levy, commonly known as Louis Jackson, No. 611, of 1926, and that links up with the bankruptcy of his son in the following year - the case of Percy Jackson, No. 574 of 1927. Louis Jackson was the father, and there was an amount of £2,000 owing from the father to the son three months before the father's bankruptcy. In that intervening three months the son paid the father £5,000 in small sums, and the father paid the son £7,000, also in small sums. The result was that at the date of the bankruptcy the son's account was clear, he had had his £2,000 repaid during the three months. The transaction was challenged as a fraudulent preference and the Court decided that the first of these payments by the father to his son was in fact a fraudulent preference. Being a fraudulent preference it constituted an act of bankruptcy, and every subsequent payment made by the father to the son was received with notice of that act of bankruptcy, so that the judgment given in favour of the trustee was not for £2,000 at all, but for £7,000. In the result the son, who was probably capable of paying the £2,000 did not pay it but suffered bankruptcy in the following year: the judgment in fact with costs, was for £8,782. There is a case where the son need not have been made bankrupt if the claim could have been restricted to the £2,000; and the claim would have been £2,000 but for the operation of the doctrine of relation back. I cite that as a case of injustice arising out of the artificiality of the doctrine.

1041. Mr. Emerson: An exceptional case of injustice? - I would not say it was exceptional. The point about the act of bankruptcy was very quickly taken up by Mr. Stable as Counsel and was upheld by the Judge.

1042. Chairman: I do not think we have had anything on the case of Jackson. - I was putting that case forward too in support of the abolition of the doctrine in relation to deeds of arrangement. If you are going to change the date of the trustee's title to relate to the petition in the case of all acts of bankruptcy, that would serve to establish the deed of arrangement, as well as take away the Jackson injustice.

1043. I am not at all certain that you should entirely abolish the right of creditors who do not want to upset the deed of arrangement. If you limit the relation back to the date of petition, you would go a long way in that direction, would you not? - No. The creditors could still petition on the grounds of the deed of assignment.

1044. But even if you limit the doctrine to relation back to the day of presentation of the petition, the execution of the deed would have to take place before the date of presentation of the petition, would it not? You could not present a petition founded on a prospective deed of arrangement? - The trustee's title would relate back to the petition, but our idea on our original suggestion is that the bankruptcy would in fact have dated back to the execution of the deed.

1045. It would be possible, of course, to limit relation back to the act of bankruptcy referred to in the petition, and not to any earlier act of bankruptcy. That might be practical, of course. I see you have made this recommendation earlier on page 7 of your memorandum. You propose:

"If bankruptcy should ensue on this petition, then the title of the trustee in bankruptcy should relate back to the date of the meeting of creditors or the date of filing the petition on the date of execution of the Deed by the debtor, whichever is the earlier."

That is the answer to what I was thinking. I am much obliged to you. I think we are all in agreement with you about the order and disposition clause now it has ceased to have any use. - (Mr. South): Custom of trade rather destroyed that.

1046. Your proposal to assimilate the landlord's rights would rather have the effect of increasing his rights in bankruptcy instead of decreasing them, would it not? - (Mr. Mahony): Not quite. At the moment he has a right of subrogation in the paying out of the preferential claims. That gives him a great advantage, of course.

1047. The landlord? - Yes, the landlord. There seems to be no valid reason why the landlord should have any greater remedy than an execution creditor.

1048. In point of fact we were proposing to assimilate the two things. We were proposing to recommend that the landlord who is distraining for rent can hold the distress without notice of a petition, otherwise he should not be preferential in respect of rent. - And not subrogated?

1049. If the two, the landlord and the execution creditor, are to be placed on the same footing, there is no point in giving a right of subrogation, is there? - None at all.

1050. Again, we were proposing to simplify the execution creditor's position in bankruptcy. That you do not disapprove of? - (Mr. South): No.

1051. Mr. Emerson: I see you suggest that the trustee should be allowed a percentage on the assets realised by the Official Receiver. I am very strongly in favour of it. The trustee has all the work of settling the tax liabilities, and unless he has got plenty of other assets he has to fix a very high percentage for his remuneration? - (Mr. Mahony): Yes. The high percentage looks terrible in his accounts.

1052. Chairman: If you allow a lump sum to be inserted, this will not matter? - No.

1053. Mr. Emerson: The lump sum might look out of proportion to the assets realised by the trustee? - In companies one can get a resolution that the liquidator's remuneration shall be so much on the assets, including the assets realised by the Official Receiver, and that covers the point; but in bankruptcy that does not obtain. In bankruptcy no percentage is allowed to the trustee on what the Official Receiver has, perhaps fortuitously, realised.

1054. Chairman: It would meet your point if it were decided to introduce the words "by the trustee or the Official Receiver"? - (Mr. South): Yes, it would.

1055. The last thing you say is that there are differences in procedure with regard to proxies. Have you anything definite in mind? - Nothing very definite. I do not know how far it is within your terms of reference but there are differences, for instance, in things like the definition of ordinary resolutions in bankruptcy and liquidation. In bankruptcy an ordinary resolution is passed by a majority in value of the creditors present and voting, whereas in the creditors' winding-up

meeting, you have to have a majority in number and value, little points like that. Probably in that case the bankruptcy procedure is the better idea. It is just a question of tidiness, trying to get the two on a similar basis. I do not think we thought of anything particular apart from proxies. - (Mr. Mahony): The shilling is another. Companies charge 1s. on proofs of debt, and in bankruptcy it is 1s. 6d.

1056. That is by Rule, is it not? That is outside our terms of reference. We are confined to the Acts. I do not know if there is anything more you want to say to us apart from your memorandum? - No.

1057. Then thank you for your assistance.

(The witnesses withdrew)

LETTER RECEIVED FROM
MR. DANIEL MAHONY, F.S.A.A.

3, Great Winchester Street,
London, E.C.2.

15th June, 1956.

E.E.P. MacFavish, Esq.,
The Board of Trade,

Dear Mr. MacFavish,

BANKRUPTCY AMENDMENT
Fraudulent Preference
Release of Bankers Surety

I fear that in the hearing before your Committee on Wednesday, I failed to make clear a point at which I was aiming.

You may remember that a discussion arose on the injustice suffered by Banks who are made liable on fraudulent preference where the benefit of the preference has in fact passed on from the Bank to a surety.

I gathered that the Committee were in sympathy with the difficulty facing the bank and might perhaps favourably consider a recommendation that the motion to reclaim the proceeds of the preference should be launched by the Trustee in Bankruptcy not against the Bank but against the Surety direct.

It then occurred to me that in a case where a bank overdraft had been reduced rapidly and extinguished before a petition was filed that the Surety would be entitled to a withdrawal of his security from the Bank and the Trustee in Bankruptcy who might later challenge the reduction of the overdraft as being a fraudulent preference would be in a very much more unhappy position than under the present law which enables him to proceed against the Bank.

I regret that in the stress of the moment, I missed the vital point, namely, that in all probability the Bank overdraft would have been reduced out of the proceeds of sale of goods supplied by the trade creditors and the hardship which now falls on the bank would in a measure be transferred to the trade creditors should the law be changed as suggested. My mind was therefore working on an endeavour to suggest an equitable compromise having for its object the subrogation for the benefit of the Creditors of the Banks rights against the securities held.

I realise that if the Bank is obliged to part with its securities to the Surety before knowledge of a petition, the claim of the Trustee in Bankruptcy to the Security in the Bank's hands would be gone; but it does seem that if the Bank was still holding the securities at the date of the filing of a petition, then the Bank could, by a suitable provision in the Bankruptcy Act, be required to retain the securities until the petition was dismissed, or if a Receiving Order were made, until say one month after the appointment of the Trustee. This month would give the Trustee an opportunity of saying whether or not he required more time to enquire further into the matter of the reduction of the overdraft being a fraudulent preference. If at or before the end of one month from his appointment, the Trustee expressed himself as satisfied that no preference had taken place, he could be required to say so, and the securities could then be released by the Bank to the surety.

Bank Managers are usually well aware of the source from which money comes in to reduce an overdraft and in a case where the slightest suspicion existed, they could without any great difficulty search at the Court to ascertain whether or not a petition had been filed.

I have discussed this point with Mr. South, the Secretary of the Society's Committee and with his concurrence am writing direct to you in case the point may in any way be helpful in your enquiry.

Yours truly,
(Sgd.) D. Mahony

Monday, 18th June, 1956

Present

HIS HONOUR JUDGE BLAGDEN (Chairman)
 MR. H. BEER, C.B.
 MR. C.B.M. EDMERSON, F.C.A.
 MR. H. LLOYD WILLIAMS
 MR. H.B. PRINCE, O.B.E., J.P.
 MR. N.B. SHERWELL, O.B.E.
 MR. B.E.P. MACTAVISH (Joint Secretary)

MEMORANDUM SUBMITTED BY THE ASSOCIATION OF
 CERTIFIED AND CORPORATE ACCOUNTANTS

INTRODUCTORY

1. In its letter of 2nd November, 1955, the Bankruptcy Law Amendment Committee (hereinafter referred to as "the Committee") invited the views of the Association, both generally on matters covered by its terms of reference, and specifically in relation to nine questions set forth in its letter. The Council of the Association (hereinafter referred to as "the Council") has now had an opportunity of considering these several matters, and desires to submit the observations contained in this memorandum.
2. The memorandum deals first with the nine particular points referred to above, and concludes with a number of proposals on miscellaneous bankruptcy matters.

RECOMMENDATIONS ON PARTICULAR QUESTIONS

Question:- Whether, and if so, how the Bankruptcy Acts should be amended in regard to the discharge of bankrupts?
 Comments on the scheme outlined in the appendix to this letter would be particularly appreciated.

3. Whilst the Council sees no serious objection to the scheme outlined in the appendix, it has no knowledge that the existing provisions for enabling bankrupts to obtain their discharge, which have operated for nearly a century, are inadequate or cast any unfair hardship upon them. If a bankrupt be in so hopeless a financial position (or feels - or be advised - that it is unlikely the Court would grant his discharge or would impose such conditions as are unacceptable to him) that he cares not whether he be discharged or no, or (as the case may be) is thereby deterred from applying for his discharge, then it is better for the community that he should remain a bankrupt (with the present attendant disqualifications and restrictions).
4. If, however, the Committee is persuaded that such a scheme is desirable, it is thought that the trustee (as well as the Official Receiver and any creditor) should have the right to apply for a caveat to be entered. Furthermore, the Council can see no point in the suggestion that the Court should there and then fix a time for hearing the discharge, which ex hypothesi cannot take place for at least two years.
5. The Council is not in agreement with the proposals in paragraph (e) of the appendix, because it appears that it would penalise bankrupts who at the date of the operation of the scheme had applied for their discharge, and favour those who had not. If any such automatic discharge were to take effect, it should - consistently with the other proposals - do so not earlier than two years after the conclusion of the debtor's public examination.

Question:- In relation to a second or subsequent bankruptcy where the bankrupt remains undischarged from a previous bankruptcy, whether assets acquired by the bankrupt after his previous bankruptcy should be applied in discharging the debts owing to creditors in the second or subsequent bankruptcy in priority to any debts remaining owing in the prior bankruptcy.

6. The Council is of opinion that assets acquired by an undischarged bankrupt after a previous bankruptcy should be applied in discharging debts due to creditors in a second or subsequent bankruptcy in priority to those remaining unpaid in the previous bankruptcy.

Question:- The desirability of increasing the monetary limits prescribed by the Bankruptcy Acts so as to take account of the fall in the value of money, particularly those relating to a petitioning creditor's debt and to the estimated value of assets to enable an order for summary administration to be obtained from the Court.

7. The Council considers that it would be desirable and proper to increase the monetary limits prescribed by the Act so as to take account of the fall in the value of money, but also takes the view that whatever increase may be decided on should apply in proportion to all the monetary limits at present in force (including those contained in Section 155 (a) of the Act), other than those relating to the preferential rights of salaries and wages, the limits of which were increased by the Companies Act, 1947.

Question:- Is it advisable to limit the vesting of after-acquired property to such property as may be claimed by the trustee?

8. The Council is not of opinion that it would be desirable so to limit the vesting of after-acquired property in the trustee. The Council consider that the provisions of Section 47 give adequate protection to bona fide purchasers.

Question:- Should creditors be able to appoint the Official Receiver as trustee in a non-summary case?

9. The Council is not in agreement with this proposal. So far as it is aware, experience has shown the long-established practice to be satisfactory to creditors. Under this practice, the Official Receiver remains trustee (he is already provisional trustee) unless the creditors take effective steps to secure the appointment of some other person as trustee. The Council is, therefore, of opinion that there are no grounds for the amendment of Section 19 in this respect.

Question:- Should provision be made for a conclusion of the bankruptcy where the debts are paid in full (with statutory interest) and a re-vesting of the surplus in the bankrupt without the necessity for any documentary transfer by the trustee?

10. The Council is not clear as to what is in mind in this connection. The title of the trustee is purely statutory and so is the title of the bankrupt to any surplus, without any documentary transfer. The Council is not aware that the present position gives rise to any difficulty either to the bankrupt or the trustee and sees no reason for any alteration, especially as it is very seldom indeed that any surplus remains, and where it does almost invariably consists of money in the trustee's hands.

Question:- Is it desirable to enlarge the provisions of Section 51 of the Bankruptcy Act, 1914, to cover all kinds of earnings including the wages of workmen?

11. The Council is of opinion that if it is thought desirable to extend the provisions of this section then they should be made applicable to all earnings or other income of a bankrupt, and that any order made under the section should not automatically cease to operate on the discharge of the bankrupt.

The Council is of opinion that the present necessity for the consent of the "Chief Officer of the Department" (sub-section (1)) should be dispensed with.

Question:- Is it desirable for an amendment to be made whereby all prosecutions for offences under the Bankruptcy Acts may be instituted and carried on by the Board of Trade in lieu of the Director of Public Prosecutions?

12. The Council is of opinion that such an amendment would be desirable.

Question:- With regard to deeds of arrangement, what provisions are desirable in order that there may be a more effective control by the Board of Trade over the administration of assets vested in a trustee under a deed of arrangement?

13. The Council is unaware in what respects it is considered that the present provisions of the Act have failed to afford effective and appropriate control by the Board of Trade. In the absence of information that such has been the case, the Council is not of opinion that the present provisions call for amendment by way of enlargement or otherwise. In other respects, the Council is of opinion that the following amendments to the Deeds of Arrangement Act would be of advantage:-

(a) That the Debtor's Affidavit (Form No. 6 in the Appendix to the 1925 Rules) be required to have annexed to it a schedule of the property therein referred to. At present, creditors have no means of ascertaining from the filed documents what the debtor's property consists of.

(b) That a trustee be required to give security in every case, as in bankruptcy, and that no dispensation be permissible, and that Section 11 (1) be amended accordingly, but that in every case the cost of giving and maintaining such security be chargeable to the estate - and that this should also apply in bankruptcy.

RECOMMENDATIONS ON MATTERS FALLING GENERALLY WITHIN THE TERMS OF REFERENCE

14. The Council believes that it will be generally agreed that on the whole the Bankruptcy Acts and the Deeds of Arrangement Act are well drafted and have functioned satisfactorily in practice. Nevertheless, experience suggests a number of respects in which the Acts could with advantage be amended and these are set forth below.

(a) Deferred Debts (Section 36)

The Council recommends that this section be extended to include any ex-wife or ex-husband of the bankrupt, and that the doubt arising from the ambiguous words "or otherwise" be removed by making it clear that the section extends to a loan to a partnership (*Ex parte Tidswell* (1887), 4 Mor. 219; *Mackintosh v. Pogo* (1895), 1 Ch. 505; *Re Clark* (1898), 2 Q.B. 330).

(b) Landlord's Power of Distress (Section 35)

The Council is of opinion that, the landlord's power of self-help having been cut down by other legislation, the provisions of the Bankruptcy Act should be brought into line by:

(a) limiting a landlord's right of distress in every case to six months' rent accrued due prior to the receiving order, and

(b) enacting that Sections 40 and 41 of the Act shall apply also to a landlord's distress for rent.

(c) Disclaimer (Sections 38 and 54)

The Council feels that the disclaimer provisions of the Act are more of a nuisance than they are worth. It is very rarely indeed that a bankrupt's leasehold interests prove to be of any realisable value; indeed, they generally constitute a liability, and there is no logical reason why that particular liability should be put upon the trustee. The Council therefore recommends that the automatic vesting in the trustee of a bankrupt's leasehold interests, unpaid shares and other onerous contracts be abolished, and that a trustee be given three months from the date of his first having knowledge of the existence of the interest in which to decide whether or not to "adopt" property of this nature. If the trustee elects to "adopt", then he should become thereby personally liable vice the bankrupt; if he elects not to "adopt" or omits to elect at all within the three months (or such extended time as the parties may agree to or, in default, the Court may allow), then the rights and obligations of the bankrupt in respect of any such property should be held to have ceased and determined as from the date of the receiving order, without prejudice to the right of the other party (as now in the case of disclaimer) to prove in the bankruptcy for any damage suffered by reason of such pre-determination of the lease or contract, as the case may be.

(d) Stamp and Premiums on Trustees' Guarantee Bonds

The Council recommends that these should be chargeable to the estate in every case, without any sanction being required.

(e) Remuneration of Trustees (Section 82)

The Council recommends as follows:-

(i) That Section 82 (2) be amended to read "If one-fourth in number and value of the creditors ..." Committees of inspection nearly always represent the largest creditors and are fully conversant with the work carried out by the trustee. The suggested amendment would largely prevent frivolous or vexatious objections by minorities.

(ii) That Section 82 (1) be amended to enable a fixed sum to be voted by the committee of inspection, or the creditors, as the case may be. The present calculation by percentages works unfairly in small estates, and in every case - large or small - takes no account of reductions in the liabilities ranking for dividend and therefore of a pro tanto increase in the rate of dividend. Thus a trustee or liquidator may, and usually does, devote much thought to minimising ranking claims. It is not by any means unknown for some creditors' claims to be reduced by as much as 50 per cent, as a direct consequence of which the creditors for admitted claims receive a dividend substantially larger than they would otherwise have done; but so long as the remuneration of the trustee is fixed partly as a percentage on the amount distributed, his skill and extra time applied to this work, often very considerable, cannot be taken into account in fixing this part of his remuneration. To effect this, it is suggested that the phraseology of Section 296 of the Companies Act be adopted, and that Section 82 (1) be amended to read: "The committee of inspection or, if there is no such committee, the creditors, may fix the remuneration to be paid to the trustee".

(f) Minor Amendments (Rules and Forms)

The Council recommends:-

(i) That a creditor should - as at present in company winding-up (Companies Winding-up Rules 149) - be empowered to give a general proxy to any person. There seems no valid reason why a creditor should be able to appoint as his general proxy only the Official Receiver, or some clerk or servant in his regular employ.

(ii) That the account of the trustee's receipts and payments required to be sent to the Board of Trade pursuant to Section 92 should be of the same size and in the same form as the duplicate copy. At present unnecessary work is caused in the trustee's office in preparing forms of different sizes.

For and on behalf of the Council of the Association:

(Signed) W. MACFARLANE GRAY, President.
A.C.S. MEYNELL, Vice-President.
F.C. OSBOURN, Secretary.

22, Bedford Square,
London, W.C.1.

March, 1956.

EXAMINATION OF WITNESSES

Mr. John Sidney Bradley-Hole, F.A.C.C.A.	} Representing The Association of Certified and Corporate Accountants
Mr. Percy Phillips, F.A.C.C.A.	
Mr. John Raymond Sparey	

Called and examined

1058. Chairman: Gentlemen, we are going to supply you with two books. The fatter one contains the amendments that we thought of making in the Bankruptcy Acts, and the thinner one contains those that we thought of making to the Deeds of Arrangement Act. It may help you to have them. What you will see in them is not, of course, finally settled because we have not yet heard all the evidence. Therefore we would ask you to treat it as confidential. - (Mr. Phillips): Certainly.

1059. When you were dealing in your memorandum with the problem of discharge you had before you, of course, the circulated scheme. We have been considering a modified form of that, and the differences between the two schemes are, very briefly, these. The scheme as circulated presupposes an application for a caveat on the hearing of the public examination and the Court then fixing a time for hearing an application for discharge, and the bankrupt only came under onerous duties as to reporting himself and so on if his discharge were refused. In the other scheme that we have been considering the caveat can be applied for by the Official Receiver or trustee at any time within two years from the public examination and immediately the caveat is entered the bankrupt comes under those onerous duties of reporting himself to the Official Receiver and his only way out is to apply for his discharge. I do not know which of those two schemes you prefer? - Personally, I would prefer the second of them, because frankly I do not see the necessity for fixing the date to hear the application for discharge when a caveat is entered. Surely once a caveat is entered, it is then up to the bankrupt, as it is now, at some time to make his application?

1060. That would be the effect of the second scheme. We thought that it was a better scheme than the one circulated. - Yes, I think it is far better. Of course, the effect is that the trustee would be a party who could enter a caveat. That was not in the first scheme at all.
1061. The Court would enter it, but the trustee would be entitled to apply for it. - Quite.
1062. When you said that you were not aware that the present Act was working unsatisfactorily, I do not know whether you were aware of the number of undischarged bankrupts that there are? - No, but as far as that is concerned they are undischarged, we believe, because they do not take the trouble to make application.
1063. Yes, that is so, but would it cause you to modify your views at all if you were told that there are some 40,000 undischarged bankrupts loose in this country? - That is, of course, far more than we thought. - (Mr. Bradley-Hole): Yes, it is.
1064. I was very surprised myself when I heard that. I had no idea that there were such a number. And, of course, a lot of them are quite harmless people? - (Mr. Phillips): Yes.
1065. As regards the existing undischarged bankrupts, we have to deal with them somehow. What we thought of doing was this. First of all, the provisions would not apply to an undischarged bankrupt who either had not surrendered to the proceedings or whose discharge had in fact been refused, or to a bankrupt whose public examination had been adjourned sine die, or to a bankrupt who was bankrupt for a second time; they would all be left in the soup to get out as best they could. But the others, we thought, should be automatically discharged two years after the coming into force of the new Act, unless a caveat is entered within those two years. - I think the circulated scheme merely said that there would be an automatic discharge of existing bankrupts without mentioning any time. If the period for this was fixed at two years, I would be in favour of it. I think, however, that there should be provision, before that happens, for circularising the creditors and the trustees with the new proposal to see whether anyone wishes to enter a caveat. The whole purpose of that would be, if such bankrupts were automatically discharged, then unless creditors and trustees were aware what was happening you might be discharging people who should not in fact be discharged, bankrupts whom the Court would not in the ordinary way discharge or who would be given a long term of suspension.
1066. Do you not think that, on the whole, the very bad bankruptcies will be in the minds of the unfortunate creditors and the very recent bankruptcies will be fresh in the mind of the Official Receiver? - Yes, provided, of course, that the creditors were aware what was going to happen. What I am trying to guard against is the fact that there will be a number of cases of bankrupts who should not obtain their automatic discharge without the creditors being aware. When the new arrangements come into force the creditors will be aware at the public examination that they can, if they wish, apply to the Court to enter a caveat. For existing bankrupts they will not know of that power unless it is specifically brought to their attention, in the same way as when a bankrupt applies now for his discharge and every creditor is notified of that fact and can, if he wishes, appear at the application for discharge. If every creditor of an existing bankrupt is circularised and is told that the automatic discharge is going to take place unless a caveat is entered, then it gives them an opportunity of applying for the entry of such a caveat if they wish.
1067. Do you think that, on the coming into force of the Act, there should be a circular to all creditors in existing bankruptcies, drawing their attention to the Section dealing with existing bankrupts? - Yes, or some other form of propaganda, so that the creditors can be aware of their rights.

1068. Mr. Lloyd Williams: Such as the publication of the Act of Parliament? - That, in itself, does not always draw the attention of the ordinary public to it.
1069. Mr. Emmerson: Some of these cases may go back thirty years. - Yes, I realise the difficulties of it.
1070. Mr. Lloyd Williams: Surely all the relevant trade journals will be busily discussing the new Act when it comes into force? - Yes, and the Chambers of Commerce and various Associations like that. I realise that it would be almost impossible to circularise every bankrupt's creditors at the same time, but I do think that steps should be taken to bring home to the creditors their rights in such cases.
1071. Mr. Peirce: Would not the trade associations do this on behalf of their members? - Not ordinarily.
1072. Generally speaking, I would have thought that one could have left that to the trade associations to do so as part of their tasks as an association. If the Board of Trade specifically asked them, I think they would, but unfortunately most of the trade associations do not think bankruptcy matters a great deal. They are more concerned with other aspects of trade. In a number of cases, they take very little interest in bankruptcy matters. - (Mr. Bradley-Hole): I should have thought that the cost of circularising the creditors in bankruptcies going back ten, fifteen or more years was quite unjustified. In a number of cases, the creditors have probably gone out of business or died as, of course, is found in such cases as have to be resurrected when an asset suddenly becomes available and the Official Receiver has to pay a supplementary dividend. I think there would be an awful waste of money, and a lot of the circulars would never reach the creditors as they appeared in the original statement of bankruptcy.
1073. Chairman: It would be a tremendous task to circularise everyone? - Yes.
1074. The next point to deal with are the monetary limits. Why do you think the amounts should be increased proportionately, because the various limits came into existence for very different purposes? - (Mr. Phillips): Personally, I am still in favour of retaining the £50 for a bankruptcy petition. I think that should remain, even though monetary values have fallen.
1075. Yes, nearly everybody agrees with keeping that. Were there any others which you thought should be treated differently? - (Mr. Bradley-Hole): There is this point about assets which are not vested, such as wearing apparel and bedding and tools of trade, and so on.
1076. £20 is farcical? - It is.
1077. What do you think it should go up to? - I should think at least £50, if not more.
1078. If a man has a large family and a lot of expensive equipment, £50 will not go very far? - I quite agree. - (Mr. Phillips): I should think myself £50 for his clothing and wearing apparel and bedding and £50 for the tools of his trade.
1079. £100 all in? - £100 all in, yes. I should distinguish, I think, between the two. - (Mr. Bradley-Hole): Bedding and wearing apparel £50, and if he has any tools of trade up to the limit of another £50.
1080. You would split them up? - Yes.
1081. We thought of putting in the word "necessary" before "tools of trade". Do you agree with that? - What about the definition of what is necessary?

1082. It is a fairly well known legal word. - (Mr. Phillips): I do not think the question of tools of trade has created much difficulty in the past. I think most trustees and the Official Receiver are quite reasonable if the man must have the tools for purposes of his trade, and, of course, if there is any difference you can apply to the Court and the Court can decide whether it is right or wrong. I do not think there has been any difficulty in the past, in my experience at any rate.

1083. Another limit that is fantastically low at the moment is that in Section 23(1)(e), removing goods without permission. At the moment it is £5, which, if it were ever literally interpreted, would mean that a man could not walk across the road with a suit of clothes on his back without permission of the Official Receiver? - There again, I do not think that there has been any difficulty in practice in the past. The man is usually in touch with the Official Receiver, who usually looks at his wrist and says "I will have that wrist watch and the fountain pen in your pocket, and the rest you can walk away with". That has been the practice in the past and it has not created any difficulty. I see the suggestion in the book is £50. Of course, one argues afterwards whether something was worth £50 or not. I am not in favour of £50, and, as I say, I do not think in the past the limit created much difficulty.

1084. It has only not created difficulty in the past because the Official Receiver and trustee have both been inclined to wink the other eye and have been reasonable about it? - I think they would, too, even with the amendment. The only point is that it creates the difficulty of deciding what is worth £50. It is easy enough to decide what is worth £5, but when one puts it at £50 it means that one has to get a valuer every time to start valuing goods and to decide whether they are worth £50 or not. That seems to be the difficulty of it, do you not think so? - (Mr. Bradley-Hole): Yes.

1085. Mr. Lloyd Williams: Would you be in favour of having a fixed sum, or would you leave it to the discretion of the Official Receiver and the trustee? - It should be left to them. I think the goods should be disclosed. I think that is one of the obligations of this Act, to disclose all goods and effects. Usually the Examiner and Official Receiver see the bankrupt before the trustee gets at him and usually tell him what he can keep and what he cannot keep. I think that has worked quite well in the past.

1086. Chairman: It comes to this, does it not: you would be in favour of leaving the £5 as it is? - As it is, yes.

1087. May we then pass to the next point you deal with? I have great difficulty in understanding what are your views about the vesting of after-acquired property. I see you want to except from the operation of the Act property which would now be disclaimable property, like leaseholds and so on, but if you are not in favour of repealing *re Pascoe* that would mean that if the bankrupt after-acquired a leasehold it automatically vests in the trustee, whereas the leaseholds he had immediately before his bankruptcy do not. It seems rather contradictory. - (Mr. Phillips): In our proposal we do say that the trustee should have a limited period in which, if he wishes, to acquire the leaseholds for the benefit of the estate. The option should be with the trustee, and if he does not want to do it then no personal obligation falls upon the trustee, which is somewhat different. The same applies if the bankrupt acquires a leasehold. The trustee should have the right, if he wishes, to take it over.

1088. Under the ruling given by the Court in *re Pascoe*, the after-acquired property vests automatically in the trustee? - Yes.

1089. In that case, you would want to repeal *re Pascoe* in order to achieve the effect you want? - (Mr. Bradley-Hole): Would that be strictly necessary? The trustee can take over after-acquired property if he wishes, and if there were a leasehold that the trustee thought was onerous I do not think that makes it obligatory, even under *re Pascoe*, to take it over. I do not think he would be under an obligation.

1090. But the moment the bankrupt acquires it, it vests in the trustee at that moment, and the only possible way to get rid of it is to disclaim it. - In that case, as regards leaseholds, I would certainly say that the Act should be amended. The trustee should not be under an obligation to take a leasehold over unless he wishes to take it over.

1091. That means that, on reconsidering the matter, you have thought the "not" should come out of your paragraph 8? - Yes. - (Mr. Phillips): Yes.

1092. You are against the appointment of the Official Receiver as trustee in non-summary cases? - We say that we do not see why the present practice should be disturbed. If the creditors do not wish to pass a resolution appointing an outside trustee, the Official Receiver remains as the trustee of the estate. They have that right. They have had it in the past and they have exercised it in the past, and we see no object in altering it now to make it so that the Official Receiver shall be, as it were, in competition with outside trustees.

1093. Of course, it has only worked in the past, has it not, because the Board of Trade has been content not to do what is, strictly speaking, its duty under Section 19(6)? It is supposed to appoint a trustee, but it does not do so. - Yes, it does not do so in practice. Our experience recently, of course, is that the Official Receivers are not too keen on taking the cases in any event. The creditors, in a number of cases where the Official Receiver can be appointed, and in many which I know about, want to appoint the Official Receiver, but this is not always what the Official Receiver wants.

1094. Mr. Lloyd Williams: But if, in fact, the Board of Trade are really ignoring their statutory duty, which they are doing, and exercising a discretion, is it not better to remove the statutory requirement and let them continue to exercise their discretion? - Yes, if you do it in a form so that the Board of Trade need not appoint an outside trustee if no resolution is passed. But the proposal is entirely different, that the creditors can, by resolution, appoint the Official Receiver, which is a different matter. - (Mr. Bradley-Hole): I think, as it stands at the moment, the creditors cannot vote for the appointment of the Official Receiver as a trustee, but they can lodge a proxy or a vote against the appointment of any person other than the Official Receiver, and therefore the creditors are in the position today of being able to get the Official Receiver to act as trustee only in a round-about way.

1095. Chairman: It is rather paradoxical. They achieve their end of getting the Official Receiver to be trustee not by appointing him but abstaining from appointing anybody else. You do not think it would be a good thing to enable them directly to do that which they can at the moment do only by a circuitous route? - I think you would have to be careful how that was administered because, if I may say so without disrespect, creditors are in many cases flocks of sheep and they are inclined to follow blindly instructions which are issued with the papers and without really giving it any consideration at all. It might so happen that they would say: "Well, we can appoint the Official Receiver", and they would just do so without really considering the effect of it.

1096. I suppose the lazy creditor would always have a slight bias in favour of the Official Receiver? - It is the practice now for a number of creditors automatically to return general proxies in favour of the Official Receiver. It does not happen very often where the creditor is interested in a large sum as he takes an interest in the administration of the estate. But many smaller creditors are inclined just to send the general proxy back for the Official Receiver and they think, from the information they get, that that is the thing to do. - (Mr. Phillips): I think it is psychological, too. For instance, at a meeting of creditors where the members of the public are present and the Official Receiver is there, it is the Official Receiver who says: "Now, do you want to appoint Mr. Jones or me?", and some creditors seem to think that it is a slur on

the Official Receiver if they do not vote for him - he is a nice gentleman and an official of the Court, and that sort of thing. I think that is the position. They feel that they are doing the Official Receiver harm by not voting for him, whereas in most cases the Official Receiver is only too desirous that they should vote him out of office.

1097. Mr. Lloyd Williams: You would like Section 19(6) to stand, although, of course, it is now honoured more in the breach than in the observance? - Quite.

1098. Chairman: I see that you were not very clear what we had in mind about the conclusion of the bankruptcy where debts are paid in full. The troubles we thought existed there were these. Firstly, there ought to be some simple means by which the ex-bankrupt can prove that his property has reverted in him. Secondly, there has occasionally been trouble where a creditor had omitted to prove his debt and, the bankrupt getting an annulment, he promptly has to start an action against him and thus starts the ball rolling once again. Then there is the creditor who, when a trustee thinks he is in a position to pay in full, comes along at the last moment and lodges a proof which upsets the applecart completely and the trustee has to start work all over again. We tried to deal with those things by revising Section 69. You will find it on page 48 of the thicker book. Perhaps you will be kind enough to look at it and see if it does the trick or not. - Yes, I have nothing against that at all. I think it is good and covers it very well.

1099. There is one problem which we were considering on which I should be very glad of your views. As subsection (4) stands at the moment, it is obligatory to draw up an order, amongst other things, annulling his adjudication. It has been suggested that the Court should have a discretion in that respect so that a really bad bankrupt should not walk out with the bankruptcy annulled merely because some friend of his has put up the necessary funds - say 20s. in the £. - Yes, there is that side to it. The position is, of course, that once the creditors have received their money in full with statutory interest, they are satisfied. The man can still be punished if there is anything that he can be criminally charged with; there is already provision elsewhere for that. I should think the cases are very few and far between where if a bankrupt has paid in full the Court has not granted him his immediate discharge. I have not, in practice, come across any case of it.

1100. Some of us felt that the certainty of getting an annulment if he paid in full was a good, solid carrot that might induce the bankrupt to make an effort to pay in full. - (Mr. Bradley-Hole): From the creditors' point of view, I think it would be better to make it mandatory upon the Court to grant an annulment in such cases, in other words the Court "shall" and not "may", rescind the receiving orders.

1101. From the creditors' point of view, I think it certainly would. The question is whether one should sacrifice expediency to ethics, or not. - (Mr. Phillips): I would like something whereby he is discharged in full from his bankruptcy, but the Court does not annul the receiving order if he has been guilty of any misdemeanour or has been a bad bankrupt. If he was a bad bankrupt and has paid 20s. in the £ afterwards, he should get his release by way of discharge instead of an annulment. I cannot see how you can penalise him otherwise.

1102. But if the man is so bad that his annulment ought to be refused although he has paid 20s. in the £, then surely he ought to be prosecuted and, having been prosecuted and convicted, he ought not to be punished twice for the same offence? - That was my first reaction.

1103. Mr. Lloyd Williams: I have made extensive enquiries into this and I found only one case where the annulment was refused. - (Mr. Bradley-Hole): I think, speaking purely personally, that I should prefer that it should remain as "shall", because I do think that the creditors' interest might be prejudiced if it were not so and it is definitely an encouragement to bankrupts to find the money to pay their just debts.

1104. Chairman: I take it that you are in favour, on the whole, of retaining the word "shall"? - (Mr. Phillips): Yes, I think so. I do not think it would do any harm by having the word "shall", whereas having the word "may" you may find in practice would operate to the detriment of creditors.
1105. I think we are both of the same opinion about the wages of workmen, but you are in favour, I notice, of abolishing the provision for the consent of the chief officer of the department in the case of a government servant? - Yes.
1106. Does that not ignore the desirability that the Crown should be properly served? - (Mr. Bradley-Hole): It would not take away the right of the servant to appear before the Court which would have discretion to refuse an order. But at the moment we are in this position, are we not, that the head of the department might arbitrarily say "No", and there is nothing the trustee or the Court can do about it. That right might be exercised quite improperly, in my view, in certain cases.
1107. Mr. Beer: Has it, in fact, been exercised improperly over the past 70 years? - It depends what you mean by "improperly", but I think in the case of serving officers, for instance, it is a practice - I have no personal experience of it, but I am told that it is the practice of the department concerned to refuse in the case of a serving officer. - (Mr. Phillips): I have had cases as far as serving officers are concerned where the Court will not attach any part of the pay of a serving officer under Section 51.
1108. Chairman: That is in the Armed Forces? - Yes.
1109. But it is a very well established privilege of the Crown that it is entitled to see that its officers - I am using the word quite generally now, including the civil service and judicial service - that its officers should have an elegant sufficiency to live on, because if they are short of money they are likely to discharge their duties inefficiently? - (Mr. Bradley-Hole): On the contrary. I think an undischarged bankrupt ought never to have been given the Queen's commission. It places his commanding officer in a very unfortunate situation, especially if he does not know about it. - (Mr. Phillips): But is it not the same as for any ordinary individual? It is for the Court to decide what sum the bankrupt can live on and what he can contribute towards his estate. If a man is stated to be a civil servant when he comes before the Registrar on an application under Section 51, the Registrar would take into account what salary is reasonable for a man in his position - as the Court does now, of course.
1110. Yes, indeed, I think that is so. By parity or reasoning, I suppose you would be in favour of doing away with the bishop's powers in the case of a bankrupt beneficed clergyman? - Yes. I think everybody today should be treated on a par, especially as the government service is expanding so rapidly. I am not suggesting that there are more and more civil servants becoming bankrupt, but a larger and larger proportion of the population are becoming civil servants, and therefore I do not see that they should have any greater privilege than the ordinary individual. As far as such people as actors are concerned, we have had that so often; you cannot do anything with them at all - or very little, at any rate.
1111. Mr. Lloyd Williams: It is in the Court's discretion, as you say. - Surely the Crown has confidence in its Judges and Registrars?
1112. Chairman: It ought to have! The same principle would, of course, apply to the case of the beneficed clergyman. The bishop might exercise his powers improperly; therefore the bishop should not have any power to overrule the Court. - Quite. - (Mr. Bradley-Hole): After all is said and done, it is the Court who is dealing with the bankrupt.

1113. It is, certainly. Supposing we decided, on your suggestion, to take away the veto of the chief officer of the department or the bishop, as the case may be, ought the Act to provide for the chief officer or the bishop having a right of audience? - Most certainly. - (Mr. Phillips): Yes, I think so. I think his views should be obtained by the Official Receiver before he puts the application to the Court.
1114. Or perhaps it would be better for the Court itself to ascertain his views? - Yes - in person, if he will do it. These sort of people usually say that they will send a letter, but they do not like appearing in Court themselves.
1115. But a letter would be sufficient? - Yes.
1116. Mr. Lloyd Williams: May I just take you up on your figures, Mr. Phillips? I think I understood you to say that, as the Civil Service is expanding considerably, civil servants should not be protected any more than the general public. It might interest you to know that there were three cases of civil servants and fifteen cases of accountants last year. - In bankruptcy?
1117. Yes. - I think I did say that I was not suggesting that civil servants were going bankrupt more, but that, as the Civil Service is expanding, more and more of the population are becoming civil servants.
1118. The figures show that this does not seem to have mattered very much so far as the number of bankruptcies is concerned. - (Mr. Bradley-Hole): The description of accountants may be somewhat misleading.
1119. Chairman: The next paragraph of your memorandum deals with deeds of arrangement, and I appreciate your suggestion about the debtor's affidavit. The only trouble is that it is a matter for the Rules, is it not? - (Mr. Phillips): Yes, I think it is more a matter for the Rules.
1120. It is strictly not within our terms of reference? - No. The Board of Trade could alter the Rules if they wished.
1121. We were rather surprised to see that you are in favour of requiring the deed trustee to give security in every case without exception. - The trustee is required to in bankruptcy, and we see no reason at all why he should not do so under a deed of arrangement. In practice, what happens today is that we send out a circular to the creditors and we put on the form of assent "To dispense with the giving of security by the trustee", and each creditor usually signs it without looking at the form, and we see no reason for that. It is all right, of course, if the trustees are professional men, but even if they are professional men they have been known to default on their obligations. The Board of Trade thought that every trustee in bankruptcy should have a bond, and we see no reason why the obligation should not extend to deeds of arrangement.
1122. I suppose someone might say that the deed is a private contract and it is open to the contracting parties to put into it anything they like within reason? - But the whole object of this, I think, was to make bankruptcy and deed procedure conform to voluntary liquidation and compulsory liquidation. A deed of arrangement is like a voluntary liquidation; bankruptcy corresponds to compulsory liquidation. But the trustee is in the same position. He has to handle funds, and therefore he should be required to give security in the same form. The charge on the estate is very little, and we think it should be borne by the estate. It does give the creditors that added security, that if the trustee defaults they have an insurance company's bond covering it.
1123. Mr. Emerson: But a liquidator in a voluntary liquidation does not give security? - No, but in our view that is wrong. He should do so in voluntary liquidation. - (Mr. Bradley-Hole): In the same way as the liquidator in a compulsory liquidation, he should not have to pay the premium for the bond himself.

1124. Chairman: I think we are all agreed that, in so far as security has to be given, it should be chargeable to the estate. - (Mr. Phillips): Yes. There is this added protection, too: that if an individual cannot pass the requirements for an insurance company's fidelity bond, then he should not act as trustee; if he can pass, then there is no hardship on him as the premium is paid by the estate.

1125. You think that the Bankruptcy Acts and the Deeds of Arrangement Act, as they stand, are well drafted on the whole, but do you not think that they are rather difficult for a newcomer to understand, for instance a person who has never practised in bankruptcy before and who is suddenly faced with one? - We have all had to have the first time, and we have all got over it. The first time I had one, I took the book home and mugged it up through half the night. But I do not think the Bankruptcy Act, in itself, is so uncomplicated that anyone taking on a trusteeship for the first time can do it on his head.

1126. It is a very complicated subject and it would be very difficult to make it really simple? - I quite agree.

1127. You are in favour, I see, of extending the provisions relating to deferred debts in Section 36 to ex-spouses? - Yes.

1128. That seems to be very important in view of the large number of divorces that take place nowadays? - Quite.

1129. Thinking it over in the light of what you say in your memorandum, I wondered if we could not simplify Section 36 a good deal. The Committee has not considered this yet but may I read you what I was going to suggest? It is Section 36 and would be subsection (1):-

"No person who was at the time of the loan or entrustment the wife or husband of a bankrupt shall be entitled to any dividend in respect of any money or other estate lent or entrusted by her or him to the bankrupt for the purpose of any trade or business carried on by the bankrupt either alone or in partnership with any other person or persons until all admitted claims of the other creditors of the bankrupt have been satisfied."

- Yes, that seems to cover it. - (Mr. Bradley-Hole): The only point I would raise is whether it is desirable to retain those words "for the purpose of any trade or business"

1130. What do you think about that? - Personally, I would delete them.

You would then put the ex-wife in the position of being a deferred creditor regardless of why the money was advanced. - (Mr. Phillips): I agree.

1131. I do not myself see quite why he or she should be penalised or put in a worse position than other creditors in respect of loans not made for business purposes? - Usually the position is this: the bankrupt will take money from the business and use it for private purposes; a wife then lends money to the business and the Section bites. But if she lends money for private purposes, the Section is inoperative. - (Mr. Bradley-Hole): Yes, there is a loophole.

1132. Do you both agree that it should be any loan made by one spouse to another? - (Mr. Phillips): Yes, I think so. I think it is very difficult to explain to the layman that a wife's loan is not deferred merely because the bankrupt did not use it for the purposes of the business. One often finds that you cannot prove that the loan was not, in fact, for business purposes. - (Mr. Bradley-Hole): I would add that the bankrupt's debts as proved under the Bankruptcy Acts are not distinguished between those for the purposes of his business and otherwise.

1133. I was going to suggest - this is very tentative and please do not think the Committee in any way have assented to my suggestion as yet,

but I was going to suggest putting in a subsection (2) in this Section:-
"In this Section the term wife includes mistress and the term husband includes paramour." - Is that not going to be rather difficult to define?

1134. Yes, but I have never been able to see why a woman who lives with a man in sin should be able to lend him money on more advantageous terms than a respectable married woman. - (Mr. Phillips): If the trustee is going to accuse a woman of being the mistress of a man and he cannot prove it, he is going to be in a very awkward situation. - (Mr. Bradley-Hole): Would that not mean where they are co-habiting in the same dwelling for a certain period?

1135. We might have to define it a little more closely than that, but do you, in principle, see any reason why a man's mistress should be in a better position than his wife? - Not in principle, but, of course, in practice it is another matter.

1136. Mr. Sherwell: It is going to be for the trustee in bankruptcy, I suppose, to prove that the woman is a mistress and that the man is a paramour? - The proof is rather on the trustee in other Sections at the moment. I would not be inclined to put any more responsibility for proof on him.

1137. Chairman: Perhaps it would be wiser to let it alone. We will consider it. - It is a matter which does, of course, cause a great deal of annoyance in certain cases because the mistress frequently adopts the name of the bankrupt and by many people she is regarded as his wife. It does leave a very nasty taste in the mouth of the creditors when a claim is lodged by a woman in those circumstances and the claim has to be admitted.

1138. I think your next point was about the landlord distraining. We were proposing that the landlord distraining should be put into the same position that we were proposing an execution creditor should be in, and the way to do it, we thought, was that if the man could hold for three weeks without notice of bankruptcy petition, he got away with it. If he gets notice of bankruptcy petition within the three weeks, then he has to cough up. Do you think that would work all right? - That is where execution has been levied before the receiving order?

1139. Yes. - I think that is excellent.

1140. I think you would agree that the Section about executions does want tidying up and simplifying? It is far too complicated? - Definitely.

1141. With disclaimer you are proposing to put the boot dead on the opposite leg to what it is on at the moment? - (Mr. Phillips): Yes.

1142. So an onerous property would be vested only if the trustee claimed it? - Yes. He should be given a limited time in which to claim, more or less in accordance with liquidation procedure. The property does not pass to a liquidator, but if he has a lease which he can sell for the benefit of the estate, he can do so.

1143. I think one difficulty would be that you would have exhaustively to define the words "onerous property". You would have to find some definition which would cover every type of onerous property? - Is that necessary? Onerous property would be any property that carries a liability to it.

1144. Mr. Lloyd Williams: You mean onerous in the view of the trustee? - (Mr. Bradley-Hole): Yes.

1145. You would leave it to the trustee to decide whether it was onerous or not? - To a great extent, yes.

1146. If he thought that it was onerous, he would not take it? - Quite.

1147. Without actually defining onerous in the Act? - Yes. I think you would have a job to define it, as you say.
1148. Chairman: It might include anything from a share not fully paid, a leasehold? - Yes. Goods in store on which there is a large sum owing for storage and things like that.
1149. Any living animal? - Yes.
1150. And a hundred and one other things. You say leave it to the trustee, and that really means that he can say "If there is any property I do not want, I am not going to have it"? - Quite. If he does not want to take the obligation on, there is no reason why he should be saddled personally with the obligation.
1151. Mr. Lloyd Williams: Do you think that might open the door to abuse? - I do not see how. The trustee must act in the best interests of the estate, and if he says that he does not want some property and it becomes of some value afterwards he is in the same position as he is now. He is answerable for it. He is in a trustee capacity and has to use his best endeavours, and as long as he does so he is all right.
1152. Chairman: It is a very novel suggestion. We must think it over. You do appreciate that it is the converse of what the principle has always been? - Yes. It has worked quite satisfactorily in liquidations. There is no reason why it should not do so here. In liquidations the liquidator has no personal liability unless he says that he is going to take the property over and then he becomes liable.
1153. Mr. Sherwell: I suppose that it depends on the bankrupt making a clean breast of what he has? - Yes, and the right must be exercisable within a certain time. - (Mr. Phillips): Yes, it is after it comes to the trustee's knowledge.
1154. Chairman: What sort of period would you suggest - three months after it has come to his knowledge? - Yes, he should be given three months from the date of his first having knowledge of the interest in which to decide.
1155. I do not think we need trouble you about the remuneration of the trustees except for this, would you be in favour of allowing an agreement for a lump sum? - Yes. We favour an agreement for a lump sum if the committee feel a lump sum is right and proper in the circumstances. We do not say we should do away with the percentage but we say the committee should have the right to fix a lump sum if they so wish.
1156. So I understood. - There is that right in voluntary liquidation but not the right in compulsory liquidation. There is a right also in deeds of arrangement whereby the trustee can have a round sum or a fixed sum, but not in bankruptcy.
1157. Mr. Lloyd Williams: It is a matter for the creditors, is it not? - Yes, it is. - (Mr. Bradley-Hole): It does create a rather false impression in the minds of some creditors I think, where a lump sum is agreed in a small bankruptcy, and as it stands at the moment, that must be converted to a percentage fixed on the amount of assets realised and the amount of assets distributed in the dividend and you get what may appear to be a high rate. The percentage is quite high, and yet the actual amount of the trustee's remuneration is a comparatively small sum.
1158. Chairman: Permission to fix a lump sum would solve all your difficulties? - There is one personal point if I may raise it. I do know the suggestion has been made, I think, by the Society of Incorporated Accountants, that the trustee's remuneration ought to be fixed on a time basis. In my view that is impracticable.
1159. I think there would be awful difficulties with that. - Extremely difficult, almost impossible.

1160. Mr. Emerson: There was another suggestion by the same body that the trustee's remuneration should be based not only on assets he realised but those realised by the Official Receiver. - Surely that operates now? - (Mr. Phillips): Yes, I think that is so. I think that could be covered if the lump sum remuneration is allowed so that factor can be taken into account. It is a fact that where the only asset may be a sum of cash in the bank of £4,000, a sum realised by the Official Receiver, the trustee has a lot of work in regard to claims and everything else but actually he has realised nothing.

1161. It would make the remuneration seem more in proportion, would it not? - Yes.

1162. Chairman: The trustee does a vast amount of useful work in cutting down the number of creditors or reducing claims which does not come into the picture in regard to remuneration at all? - He may even have to take proceedings in some cases and with no tangible result to show for it afterwards. - (Mr. Bradley-Hole): And that would in the ordinary way mean his remuneration would be at a very high rate on the actual amount of assets distributed in dividend.

1163. You suggest that the trustee should be allowed to render accounts on the same form to the Board of Trade as elsewhere. That is not in the Act and I think it is rather outside our terms of reference. -

(Mr. Phillips): It is probable that the Board of Trade has its own particular ideas on the subject but it makes an awful lot of work when you have to make four copies and cannot put them through the typewriter together because they are different sizes, and you have to have them copied four times over.

1164. It is a pure waste of time and money? - It is, yes.

1165. Those are the matters dealt with in your memorandum, but there are one or two other matters we wanted to ask you about. Firstly, as regards the deed of arrangement we thought of cutting down the time in the case of a petition for a deed of arrangement to one month. Are you in agreement with that? - We are in agreement with that.

1166. We also thought of empowering the Court on a bankruptcy petition founded on a deed of arrangement not merely to dismiss the petition if it thought that the object was blackmail - which it very often is - but also if it was of the opinion that a receiving order was not in the interests of the general body of creditors. - We think that if three-quarters of the creditors in number and value agree to the deed, then, unless the petitioning creditor can show cause to the contrary, the Court should refuse to make the receiving order. - (Mr. Bradley-Hole): The Court should have a discretion to refuse.

1167. Mr. Lloyd Williams: It has now? - Yes, it has. But if it was binding on the Court then, unless there were circumstances which required the matter to be investigated in bankruptcy, the Court could refuse to make an order if 75 per cent. of the creditors in number and value desired the deed to go on.

1168. Chairman: You do not think it would be merely enough to say that the Court shall dismiss the petition if it is satisfied that the receiving order is not in the interests of the general body of creditors? - (Mr. Phillips): It puts the onus then on the Court.

1169. The onus really, in effect, is on the deed trustee? - On the deed trustee to an extent but I think the creditors themselves should have a say unless it is a dirty case, or anything like that, and there are grounds for a receiving order being made. But if there is nothing in it and three-quarters of the creditors in number and value are of the opinion that a deed is more beneficial I think they are the ones principally involved, they are going to lose their money, and therefore they should have more right of say than the Court itself.

1170. One witness suggested that for the purpose of ascertaining the wishes of creditors generally a bankruptcy petition founded on a deed should be advertised in much the same way as a petition for compulsory liquidation, and creditors other than the petitioning creditors should be entitled to be there at the hearing either to support or oppose the petition. What do you think? - That might defeat its object. The reason is this. There is an advantage to be obtained by the debtor agreeing that a relative or friend should withdraw certain claims provided the matter does not go into bankruptcy with the stigma of bankruptcy. But once you get that advertisement in the papers the debtor will say: "Well, I have got the stigma, why should I prevail on my friends and relatives to withdraw their claims?" What advantage you would get then of paying more to the unsecured creditors would go. That is one of the reasons why I say that the discretion should be with the creditors more than with the Court.

1171. Mr. Lloyd Williams: If you are faced with a position where a deed has been executed and one creditor who stood out comes before the Court and the Court is satisfied, as it must be satisfied, that it is not in the interests of the general body of creditors it shall dismiss the petition then surely that is good enough? - My point is that you are then putting the onus on the Court whereas in my proposal if, after a full meeting of creditors, 75 per cent. in number and value of the creditors resolved that it was more beneficial to them that the matter be administered under a deed of arrangement, then the Court shall be required to take that into consideration.

1172. How would that evidence be brought to the Court? - By an affidavit by the trustee.

1173. Surely, an affidavit by the trustee that he is appointed under a deed is the same thing, is it not? What is the difference? - I do not follow. The difference between us is that you propose that discretion should be entirely with the Court. My proposal is that the Court should take into account the wishes of the creditors and where 75 per cent. in number and value agree then they should dismiss the petition unless the petitioning creditor can produce evidence to the Court that it is necessary that the matter shall be dealt with in bankruptcy, or the Court is of the opinion because of the affidavit. It is similar to an order now against a voluntary winding-up. A petitioning creditor can go before the Court and say that the matter should be dealt with as a compulsory liquidation and the Court will make the order, but the Court following the decision in re Karsberg has got to take into account the wishes of the vast majority of the creditors.

1174. They would now under the Chairman's suggested amendment, surely? - Under the suggested amendment the Court would merely decide itself.

1175. No, the wording is, "the Court shall dismiss". - Dismiss the petition if the Court be satisfied. My view is that the Court should take into account the wishes of the vast majority of the creditors. That is the difference between us. You see, you do not mention the creditors' wishes at all but leave it to the Court to decide whether they think it is more beneficial.

1176. May we consider the suggested clause? I have an idea it rather covers it. - Yes, I see. All I would put in there is: - "and against the wishes of the general body of creditors".

1177. "Is not in the interest of", or "contrary to the wishes of" creditors? - Yes: "or contrary to the wishes of"

1178. That would meet your point? - Yes, that would meet my point.

1179. I think you must still leave the discretion with the Court. - Yes, the final discretion must be with the Court, but it was held in the Court of Appeal in re Karsberg that the Court must take note of the wishes of the vast majority of the creditors.

1180. Chairman: If it read like this: "Or that a receiving order is not in the interest, or is against the wishes, of the general body of creditors", that would cover it? - (Mr. Bradley-Hole): How about "of the statutory majority of creditors"?
1181. I think the words "general body" are better because they give greater latitude? - Yes.
1182. Mr. Lloyd Williams: That would cover your point, would it, Mr. Phillips? - (Mr. Phillips): Yes.
1183. Chairman: It has been suggested to us that the Deeds of Arrangement Act should include some sort of power - we are not very clear about the details yet - to throw the administration into bankruptcy if it transpires that the debtor has been guilty of misconduct of any sort. - Yes, I think that there should be that power, but there again I think the Court should act in accord with the general wishes of the creditors.
1184. Yes, it would have to be with the wishes of the creditors, but the witness had had experience of a case of a man who had executed a deed of assignment and then prevented the deed trustee from taking possession by means of a shot gun. Do you think it would be a good idea in principle that in cases like that the creditors and the trustee between them should have the power to throw the thing into bankruptcy? - Yes, but I am only thinking how you could have a receiving order made. You would have to amend the Act presumably giving a creditor the right in such cases, notwithstanding that he has assented to a deed of assignment, to present a petition for bankruptcy.
1185. What we thought of doing is by making it simply a summary application to the Court by the deed trustee. - Yes, that would be a good way. I think it would be fair to let a debtor know and appear on the application. - (Mr. Bradley-Hole): Is it proposed to put a time limit on it?
1186. No, it was not, because the idea was not merely for the application to be made where a debtor has been guilty of misconduct after executing the deed but it was intended to be applicable to misconduct before executing the deed. - (Mr. Phillips): And discovered afterwards?
1187. Yes, it might turn out that just before the execution of the deed the debtor paid the money which he owed his aunt in full and it might only come to light after the execution of the deed. - (Mr. Bradley-Hole): I did not make myself clear. I meant, was it proposed to limit the time from the date of the deed?
1188. Mr. Lloyd Williams: No, it could be any time. - (Mr. Phillips): I see. Any time up to the time the trustee has completed his trusteeship.
1189. Chairman: Would you be in favour of having a statutory form which the deed of arrangement has got to follow? - Definitely, yes.
1190. Mr. Lloyd Williams: With provision for all sorts of variations? - I think the Law Stationers' form is the one most commonly used by accountants today. - (Mr. Bradley-Hole): It has a lot of blanks. - (Mr. Phillips): I think it is right that a certain number of blanks should be left to be filled in according to circumstances.
1191. What is the point of a statutory deed? - The trouble at the moment is that sometimes solicitors and accountants not versed in these matters and knowing nothing of the Law Stationers' form prepare a deed which is full of loopholes.
1192. Solicitors prepare a deed which is full of loopholes, surely not? - Shall I say solicitors not versed in insolvency matters.

1193. Surely not! - I have seen some horrible deeds in my time!
1194. In other words, you would like to make the Law Stationers' form the model used in the Schedule? - To a great extent.
1195. Mr. Emerson: For all five types of deed? - Yes. A deed of composition is a different matter, I am excluding that. It is the pure deed of assignment where the debtor's property passes to a trustee for the benefit of the creditors generally. The deed of composition is a different matter entirely as the property is not transferred to a trustee.
1196. You do not want a form of deed of composition, or of a deed of inspektorship? - No.
1197. Chairman: If we may turn to something else now. There were several suggestions made to us about rates and taxes; first, that they should have no priority at all; second, that they should enjoy priority only in respect of the last complete tax year; and third, that it should be one of the last three complete years selected by the tax authority. - (Mr. Bradley-Hole): I think the Association's recommendations are silent on that.
1198. Yes, you are silent in your memorandum. - I think we ought to tell you that we did, as a committee, give serious thought to Section 33 and made recommendations to the Council. We felt there were grounds for the abolition of priority for rates and taxes, or, at any rate, revision of this Section so that it would restrict the rights of certain preferential creditors, including the rights of municipal authorities to priority for rates, and limiting of the year in which the Inland Revenue could claim priority.
1199. You would be in favour of taking the last year for tax? - (Mr. Phillips): We would not take away priority entirely. We say we believe in priority for the last six months for rates and one year for taxes.
1200. Six months for rates? - And one year for tax. My own view, frankly is that the tax priority should relate only to income tax or profits tax and purchase tax should not in any case be preferential. I think purchase tax has become a great burden on insolvent estates and we have many occasions where the Customs and Excise get the whole lot and the other creditors get nothing at all. It has got so large these days that a company dealing with goods liable to purchase tax at a very high rate if eventually they go into liquidation, or an individual goes bankrupt, the claim by the Customs and Excise is for such a large amount that the other creditors get nothing. They have a system now, they give them very little latitude, and if they do give latitude well then they should come in and suffer as the others do and become unsecured creditors. As regards the ordinary assessed income tax that should be only up to the 5th April prior to the date of the receiving order. We do not think in the case of actors where the Inland Revenue allow them to run on for six or seven years they should be allowed afterwards to come along and take the best year for their preferential claim to the detriment of the rights of unsecured creditors.
1201. Mr. Emerson: You feel strongly about in re Pratt? - We do.
1202. Chairman: Have you any views about the existing doctrine of relation back which, it has been suggested to us, should be limited to the date of the petition? - To the date of the deed of arrangement or the bankruptcy petition whichever is the earlier, would, we think, be fair.
1203. Mr. Emerson: If we could go back to Section 33 for a moment could we ask you for your views about a suggestion that has been put forward that a certain period or certain sum for wages should be treated as pre-preferential? - I think that is a good suggestion. It would not be a

great burden on the estate because usually if there is a business of any sort the trustee will carry it on and pay the wages in any case, while if the business is closed down the last week's wages would be very little. It would also save a good deal of trouble because you do have lots of people who are owed £2, £3 and £4 and, until after the Inland Revenue claim and everything else is settled, you cannot pay them a penny.

1204. Chairman: Would you be in favour of limiting it in any way? - To one week's wages only.

1205. Do you think the trustee ought to have some express power to borrow money from a bank for the purpose of paying the pre-preferential debt? - Yes, he should be allowed to do so if he considers it necessary but most trustees I think would be very loath to do it unless they were sure of getting a sufficient sum of money to reimburse them.

1206. Would you be in favour of extending to bankruptcy the Companies Act provision about the subrogation of the person who has advanced money to pay wages? - (Mr. Bradley-Hole): Very definitely not. - (Mr. Phillips): There may be a case for the last week before the date of the receiving order but not, I think, prior to that. - (Mr. Bradley-Hole): It has been our experience that the mere fact that money is advanced by the bank only delays the inevitable day of the crash and when that comes the position is far worse than it would otherwise have been.

1207. To put it in other words it is a direct encouragement to trading with knowledge? - Exactly, with knowledge of insolvency, and of course the creditors would have no possible idea that is being done.

1208. No, quite. Someone, I think, suggested that in bankruptcy it would be like providing that the burglar's mate should have first charge on the swag! It has been suggested, and we have been thinking about it, that it might simplify the business about fraudulent preference if for the last three weeks before the petition, any payment which does in fact prefer a creditor should be voidable even without proof of intent. - (Mr. Phillips): I think I would go further than that and reverse the present procedure whereby the onus of proof is on the trustee, or you have to get the bankrupt to say: "I did intend to prefer", to make the inference that all payments other than in the ordinary course of business were in fact preferences unless the bankrupt or the person the trustee regards as preferred can prove to the contrary. I have fought in two or three of these cases right through and have had the utmost difficulty at any time in proving preference. It is a little easier now than it was in the 'thirties when we were fighting these cases right through. It was hopeless then. - (Mr. Bradley-Hole): It would mean payments for a past consideration, payments made within an agreed period prior to the petition?

1209. Any payment which does in fact prefer somebody can be deemed to be voidable preference unless the payee shows to the contrary? - Yes, but at present it means that the trustee has to prove what was in the bankrupt's mind.

1210. Which is very nearly impossible? - Yes.

1211. Mr. Emerson: It would mean that the onus is on the trustee to investigate every single payment for six months? - Yes, if it was for six months, but the suggestion was for a shorter period, I think.

1212. Our suggestion was 21 days. - (Mr. Phillips): I think the trustee does investigate all payments made in the ordinary course of business. You have to go back six months in any case.

1213. Our suggestion is that any payment made 21 days before or after should be void irrespective of any intent at all. - Even in the ordinary course of business?

1214. Chairman: We were going to except payments for current necessities, the baker, bread, milk, and that sort of thing. - Let us assume that a bankrupt buys goods on seven-day terms and paid seven days within the 21 days and more goods are taken, would you still consider that that would come under your definition of payment within 21 days?
1215. Should he order goods or pay for them 21 days before the petition? - He should not, but I am thinking of the person supplying goods on seven-day terms and getting one cheque and delivering another lot of goods which admittedly the bankrupt should not have had, but that person is in effect no better off. He may have had £25 and delivered another £25 worth of goods, that is the danger you are up against. - (Mr. Bradley-Hole): That would be a payment for a past consideration, would it not? - (Mr. Phillips): Yes, payment for goods supplied the week before if you are paying on a seven-day account.
1216. I think we ought to except goods paid for within seven days even in the ordinary course of business. - Yes. Otherwise any payments made within six months shall be deemed preferences unless the bankrupt or person can show to the contrary.
1217. This is only a detailed matter of procedure but it has been suggested that there should be provision in the Act empowering the trustee to read out the notes of the public examination where he takes proceedings under the fraudulent preference section. Provided the bankrupt is called and that the payee has a chance to cross-examine, do you see any objection to that? - I cannot see any objection.
1218. It ought to be a condition that the trustee should call the bankrupt for cross-examination, do you not think so? - Yes, definitely.
1219. There is one other matter in connection with fraudulent preference we should be glad of your views on and that is this; where the intention is to prefer a surety and not the principal creditor, do you think the trustee should as at present have to go to the principal creditor or do you think he should have a right to shoot direct at the surety? - I think he should have a right to shoot direct but I do not think the right to go for the principal creditor should be taken away.
1220. You mean he should have both? - He should have both but if he prefers to go for surety and leave out the principal creditor he can do so.
1221. That means that if the surety has fled the country or himself become bankrupt he would inevitably go for the principal creditor? - (Mr. Bradley-Hole): Yes. That operates frequently now where the principal creditor is a bank.
1222. That means in its turn that where the bank acted perfectly properly and prudently they get shot at where the surety has absconded or goes bust, and the risk of the surety absconding or going bust is carried by the unfortunate banker? - (Mr. Phillips): I think you will find that the present practice is that as soon as a receiving order is made - unless the banks are unaware of it some time before and the surety takes out his deeds of his securities - the banks cannot part with them until at least six months afterwards, or until they receive a letter from the trustee to say that they can part with them. The banks are making it the practice now that they will not part with them after the date of the receiving order, but of course if they have already parted with them before the date of the receiving order it is unfortunate. In all cases of fraud - I should not say all cases but in a number of cases - where the debtor intends to prefer some quite innocent party and the other party quite innocently spends the money or does something with it, there is no reason why the trustee should not recover; it may be hard luck on the person who has had the money and spent it but I still think that right should remain even with a bank.

1223. Mr. Lloyd Williams: Do I understand you to say that, if he pays off the overdraft, the bank on the notice of a receiving order refuses to hand over the securities for six months? - For six months, yes. In my experience they write to the trustee and say: "Do you intend taking any proceedings as Mr. X requires his securities back?"
1224. But surely proceedings could be taken against the bank? - My own view is that if he did the surety could get his securities but in effect I think the bank manager says: "I will not hand them over", and the surety usually thinks he had better let sleeping dogs lie, otherwise he may force the trustee to do something. In my experience the position is that the banks today will not hand securities over unless possibly they are forced to by legal proceedings. I might say that in some cases where a debtor wants to keep in with a particular creditor even though he is going bankrupt he pays him off and prefers him, and that creditor has used the money he has to put the money back. If the bank have an overdraft that is the overdraft of the debtor. Even if they are guaranteed by a third party they still have an obligation in the same way if they are paid off and I cannot see why they should be released entirely. In practice where the surety is a person of substance the trustee will go direct for him.
1225. Chairman: The only other thing we wanted to ask was, have you any experience of or had any trouble with public utilities like gas, water and electricity? - Yes, unfortunately we always do. It is a great burden sometimes when for instance you have the lease of a building that you may be able to sell for perhaps a few hundred pounds. You find there is an electric light bill owing of £150, or something like that, and unless you give an undertaking to pay that the authority will cut off the electric light and you cannot do anything with the premises at all. It is unfair.
1226. Very unfair - (Mr. Bradley-Hole): I have had experience of cases where the Official Receiver has frequently been put in a very awkward position because the debtor refuses to sign consent to the order of adjudication and the Official Receiver cannot contend that he is a new consumer. Where there has been an order of adjudication, my experience is that the Official Receiver has successfully got a new supply as a new consumer.
1227. Mr. Lloyd Williams: For electricity and gas? - Electricity and gas, yes.
1228. Not the telephone service? - We have had no bother with the telephone at all. This is where there is an order of adjudication, not a mere receiving order. - (Mr. Phillips): That is not my experience with the London Electricity Board, unless you give a personal guarantee to pay the outstanding amount.
1229. They have certain obligations under their various Acts have they not? - Possibly.
1230. Chairman: We ought to provide somewhere - I do not know where at the moment - in the Bankruptcy Act that the Official Receiver and the trustee should be deemed to be respectively a new customer and a public utility shall not be entitled to require payment in full of their debt as a condition of supplying the Official Receiver or trustee? - (Mr. Bradley-Hole): That is on the making of a receiving order?
1231. Mr. Emerson: I see one difficulty there. What they will do is say: "All right, you are a new customer. We want a deposit of £1,000". - (Mr. Phillips): That does not matter. The trustee knows more or less what he is going to consume there and he can probably arrange that. If there is a qualified professional man they do not worry about the deposit but they do worry about having their outstanding account paid and that is a great burden on the trustee.

1232. Mr. Lloyd Williams: Of course, really today they are preferring themselves, that is what it comes to, they are getting paid in full? - Yes.
1233. Chairman: Would it meet the case, do you think, if you had the provision I have just suggested that they should not be entitled to demand any greater deposit than they would have demanded from anyone else? - (Mr. Bradley-Hole): I think that may be rather a boomerang, it is rather suggesting that they should ask for a deposit! - (Mr. Phillips): Yes, it may put them wise to their rights. I have signed many a new contract but never been asked to pay a deposit.
1234. One witness has suggested to us that a small payment might be allowed to members of the committee of inspection for their attendance, over and above their travelling expenses. - (Mr. Bradley-Hole): Personally, I would be in favour of that because it is difficult enough to get creditors faced with a bad debt to devote time in trying to recover some part of that in the interests of all the creditors. I think it is a very reasonable suggestion. - (Mr. Phillips): The only danger is that you may get what I call professional members of committees, the people who make it a business to get on to committees of inspection, especially representatives of trade associations and debt collection associations and people like that.
1235. Mr. Lloyd Williams: It is not merely a matter of going but helping the trustee to get on with the job? - If discretion was left to the trustee that in a particular case he could make a payment to a member of a committee of inspection that might be satisfactory.
1236. Not exceeding one guinea? - A particular amount?
1237. You would leave it to the discretion of the trustee? - It is all right for people living near to where the trustee has his place of business but, if a man comes from the other side of the country, even though he gets his travelling expenses he gets nothing for the loss of a whole day. I think there is a case to be made out for that but it is a wrong principle if the man next door pops in for half an hour that he should expect payment for doing it.
1238. He may pop into half-a-dozen meetings in one afternoon! - Quite. - (Mr. Bradley-Hole): You may get over it by saying he is entitled to his expenses necessarily incurred.
1239. Mr. Peirce: Do you think a fee of one guinea for an attendance would make any difference to the attendances? - (Mr. Phillips): I do not think so, personally. As I said before I think it would only mean a difference to the man coming along to pick up his guinea, but I do not think the people lax in attending committee meetings would go along if you told them there was a guinea waiting for them if they attended. We all know if committees are appointed there is the utmost difficulty in getting them to meet but I do not think one guinea or even two or three guineas would entice them to come along.
1240. Chairman: In other words the amount is so small it would not attract? - Quite, but if a man has to lose a whole day, the trustee might be empowered to pay him £5 for the day if it is necessary for his attendance. I think it should be at the discretion of the trustee and I think that is better than fixing a round sum for each member of the committee.
1241. Mr. Lloyd Williams: That might be open to abuse? - Quite.
1242. Is it not better to say no remuneration at all, or a set sum? - (Mr. Bradley-Hole): I think so, because a man may come along who may be a managing director of a big firm. He may say: "A reasonable sum for my time here today is ten guineas or fifteen guineas", which is out of all proportion. It may be reasonable for his time but the trustee would

be in a difficult position. - (Mr. Phillips): I think there should be an upper limit. - (Mr. Bradley-Hole): You are going to have a minimum then. - (Mr. Phillips): Not particularly. A limit to the discretion of the trustee, and the trustee can ascertain what he considers the man has lost.

1243. Mr. Peirce: Is it not a fact that the people most interested - with the most money involved - are fighting a battle for the people who are not so interested? - That is so, and therefore the guinea would not make any difference.

1244. Mr. Emerson: Do you think that if instead of calling a meeting of the committee of inspection a postal vote of all the members of the committee should be binding? - Yes. - (Mr. Bradley-Hole): Yes.

1245. Chairman: It has to be unanimous? - (Mr. Phillips): Yes, it has to be unanimous. It is done in practice now and I think it is very useful.

1246. Were there any other points you wanted to raise? -

(Mr. Bradley-Hole): There is one other matter which may be outside the scope of this Committee and that is on the question of the table of fees for the Official Receivers in bankruptcy which I think creates a most unfortunate situation. They have been in existence now from the year dot and are out of date.

1247. It is rather outside our scope I am afraid. - (Mr. Phillips): I think Mr. Bradley-Hole has in mind the fact that a creditor may get two statements, one from the Official Receiver and one from an outside trustee and the Official Receiver works to a Board of Trade scale fixed many years ago when costs were very different then than they are today. When he sees that the outside trustee has charged more he will say: "Look what we are paying for the benefit of having an outside trustee".

1248. Those are all the questions we have. Thank you very much indeed for coming along this afternoon.

(The witnesses withdraw)

Monday, 25th June, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

MEMORANDUM SUBMITTED BY THE INSTITUTE OF CHARTERED ACCOUNTANTS
IN ENGLAND AND WALES

Terms of reference

(1) This memorandum is submitted in response to an invitation by letter dated 2nd November 1955 from the Bankruptcy Law Amendment Committee appointed by the President of the Board of Trade, under the chairmanship of His Honour Judge Blagden, with the following terms of reference:

"To consider and report what amendments are desirable in

- (1) the Bankruptcy Acts, 1914 and 1926, more particularly in regard to the provisions relating to the discharge of bankrupts; and
- (2) the Deeds of Arrangement Act, 1914."

(2) In preparing this memorandum the Council has had the benefit of the advice of a number of members of the Institute who have specialised experience in bankruptcy matters. In addition the Council has had the assistance of regional committees consisting of members of the Institute who may be regarded as representative of members throughout England and Wales.

General

(3) The present law concerning bankruptcy is somewhat complex, in view of the number of additions which have been made by Statutory Rules and Orders, by the Companies Act 1947, and by other Statutes. The Council therefore considers that it is desirable for all the relevant statutory provisions to be consolidated into one statute.

Matters on which the committee has requested evidence

(4) The Council makes the following comments on the nine specific matters listed in the letter of invitation referred to in paragraph (1) above:

Item (1) Whether, and if so, how the Bankruptcy Acts should be amended in regard to the discharge of bankrupts. Comments on the scheme outlined in the Appendix to this letter would be particularly appreciated.

(a) In principle the Council approves the suggestion that at the end of a certain period after the conclusion of his public examination every bankrupt would become automatically discharged unless a caveat were entered on the Court file against such automatic discharge. The official receiver should however be required to

apply for a caveat to be entered if in his opinion the public examination discloses:

- (i) that the bankrupt has committed any misdemeanour or felony within the meaning of the proviso to Section 26 (2) of the Bankruptcy Act 1914, as amended by Section 1 of the Bankruptcy (Amendment) Act 1926;
- (ii) any of the facts mentioned in Section 26 (3) of the Bankruptcy Act 1914, other than that the bankrupt's assets are not of a value equal to ten shillings (or six shillings and eightpence as suggested by paragraph 17 below) in the pound of the amount of his unsecured liabilities, except that the official receiver should have a discretion where he considers the offence to be of a trivial nature;
- (iii) that the bankrupt has made a settlement covenant or contract which comes within those defined in Section 27 (1) and (ii) of the Bankruptcy Act 1914.

Two years appears to be too short a period for the purpose of this scheme as in some cases it would not have been possible to conclude the administration of the estate within that time. Three years is therefore suggested as a more appropriate period.

(b) The words in the appendix "This caveat would be entered at the conclusion of the public examination ..." should be altered so that a caveat may be entered at any time between the conclusion of the public examination and the discharge of the bankrupt.

In addition to the official receiver and any creditor the trustee should also have the power to apply for a caveat to be entered.

(c) The suggested duties to be performed by a bankrupt whose discharge has been refused by the Court are approved, but penalties for non-performance should be provided to assist enforcement.

(d) The Council agrees that a bankrupt against whom a caveat has not been entered should have the right to apply for a discharge at any time after the conclusion of his public examination.

(e) The proposed provisions for automatic discharge of all existing bankrupts (other than those who have been bankrupt on more than one occasion and those whose discharge has been refused by the Court) should require the official receiver and empower the trustee (if still in office) to enter a caveat in any cases where they consider it necessary for the Court to decide whether discharge should be granted. Otherwise the result would be to discharge some who have not seen fit to apply for discharge because they consider there is no likelihood of a discharge being granted, including those against whom a caveat would have been entered had the suggested new scheme been in operation at the date of their public examinations. If the Council's suggestion were adopted, it would be necessary to delay the operative date for automatic discharge, to enable official receivers and trustees to decide which cases require the entering of a caveat.

Item (2) In relation to a second or subsequent bankruptcy where the bankrupt remains undischarged from a previous bankruptcy, whether assets acquired by the bankrupt after his previous bankruptcy should be applied in discharging the debts owing to creditors in the second or subsequent bankruptcy in priority to any debts remaining owing in the prior bankruptcy.

The assets should be applied first in discharging debts owing in the latest bankruptcy.

- Item (3) The desirability of increasing the monetary limits prescribed by the Bankruptcy Acts so as to take account of the fall in the value of money, particularly those relating to a petitioning creditor's debt and to the estimated value of assets to enable an Order for Summary Administration to be obtained from the Court.

Monetary limits prescribed in the Bankruptcy Acts should be amended as follows:

- (a) The amount of a debt or debts owing by a debtor as described in Section 4 of the Bankruptcy Act 1914 should be raised from £50 to £100.
- (b) Section 129 of the Bankruptcy Act 1914 should be amended so that a small estate which may be administered summarily is one in which the property of the debtor is not likely to exceed in value £500 (instead of £300).
- (c) Section 38 of the Bankruptcy Act 1914 should be amended so that a debtor's essential household furniture should not be divisible amongst his creditors. The aggregate amount of the value of the debtor's tools, wearing apparel, bedding and essential household furniture not divisible should not exceed £150 in value.

- Item (4) The advisability of limiting the vesting of after acquired property to such property as may be claimed by the trustees.

Such property should vest in the trustee whether or not he has become aware of it or made a claim to it, and no amendment is required to the present state of the law.

- Item (5) Whether creditors should be able to appoint the Official Receiver as trustee in a non summary case.

Creditors should be free to appoint as trustee whomsoever they may wish.

- Item (6) Whether provision should be made for a conclusion of the bankruptcy where the debts are paid in full (with statutory interest) and a re-vesting of the surplus in the bankrupt without the necessity for any documentary transfer by the trustee.

Where debts are paid in full with statutory interest, except where this has been waived, and the costs, charges and expenses of the proceedings under the bankruptcy petition have been paid, the Court should have the power to declare that the bankruptcy is annulled. The declaration by the Court should re-vest any surplus in the bankrupt, without the necessity for any documentary transfer by the trustee.

- Item (7) The enlargement of the provisions of Section 54 of the Bankruptcy Act, 1914, to cover all kinds of earnings including the wages of workmen.

These provisions should be so enlarged.

- Item (8) An amendment whereby all prosecutions for offences under the Bankruptcy Acts may be instituted and carried on by the Board of Trade in lieu of the Director of Public Prosecutions.

The Council would approve an amendment whereby all prosecutions for offences under the Bankruptcy Acts may be instituted by the Board of Trade in addition to the Director of Public Prosecutions.

- Item (9) With regard to Deeds of Arrangement, what provisions are desirable in order that there may be a more effective control by the Board of Trade over the administration of assets vested in a trustee under a Deed of Arrangement.

The Council is not in possession of any evidence to show that there is need for more effective control by the Board of Trade over the administration of assets vested in a trustee. Deeds of Arrangement are a private arrangement between creditors and a debtor; the procedure must be deemed to be adopted deliberately as offering more flexibility than the normal bankruptcy procedure and it does not call for an extension of Board of Trade control.

Deeds of Arrangement Act 1914

The Council makes the following comments on sections of the Deeds of Arrangement Act 1914:

Section 2

- (5) The time allowed for the registration of a deed of arrangement should be extended from seven to fourteen days. The time limit of seven days is too short when the debtor is not readily available or when his affairs are particularly complicated.

Section 3

- (6) This section should be amended so that a deed which has been assented to by three-fourths in value of the creditors shall, subject to appeal to the Court, be binding upon the remaining creditors. The deed should be based on the principles of bankruptcy and its contents should be disclosed to all creditors, either in full or by the procedure suggested in the next paragraph below. This would remove the present dilemma of a trustee appointed under a deed of arrangement, who normally has to face the possibility that a non-assenting creditor whose debt amounts to £50 (or creditors totalling £50) may treat the deed as an act of bankruptcy for the purpose of Section 1(1)(a) of the Bankruptcy Act 1914. By the provisions of Section 4(1)(c) of that Act the deed remains an act upon which a non-assenting creditor can present a bankruptcy petition against the debtor for a period of three months after its execution. A trustee can, by giving notice to any creditor in accordance with Section 24 of the Deeds of Arrangement Act 1914, reduce this period of three months to one month, but a trustee does not normally do so as it tends to invite a creditor to take steps for bankruptcy.

- (7) Consideration should also be given to appending to the Act a standard form of deed of assignment, based on the principles of bankruptcy, which should apply to assignments made under Section 1(2)(a) of the Act. The Act should allow variations to be made to the standard deed to suit particular circumstances and to provide that any variation from the standard deed should be notified to a creditor when he is invited to assent to the deed. The existence of such a standard form of deed of assignment would provide information in a convenient form for creditors when they are asked to assent to a deed. At the present time many creditors assent to a deed without knowing what is in it.

Section 14

- (8) This section should be amended so that the power conferred on the High Court to compel a trustee to send progress reports to all assenting creditors at six-months intervals can be exercised by the County Court having jurisdiction.

Section 16

- (9) This section should be amended to remove the necessity for applying to pay into Court monies representing unclaimed dividends and undistributed funds in the hands of the trustee; instead, it should be

compulsory for such funds to be paid into a central account, the unclaimed dividends on the expiry of six months from the declaration of each dividend and the undistributed funds within six months from the date of declaration of the final dividend. It might be considered appropriate to establish a special central account at the Bank of England, under the control of the Board of Trade, entitled 'Deeds of Arrangement Estates Account' and operated in a somewhat similar manner to the Bankruptcy Estates Account. A consequential amendment to rule 36 of the Deeds of Arrangement Rules 1925 would become necessary.

Section 19

(10) An addition should be made to this section so that, where a receiving order is made within three months of the execution of a deed, a trustee should not be treated as a trespasser if in the opinion of the official receiver (subject to an appeal to the Court) he has acted bona fide during the period of trusteeship.

Section 21

(11) This section should be amended so that, where a deed becomes void by reason of the bankruptcy of the debtor, a trustee should be entitled to reasonable and proper remuneration for services rendered. The reimbursement of all expenses properly incurred in the execution of his duties should be allowed and not limited to those expenses incurred by the trustee 'in the performance of any duties imposed on him by this Act'; the section should be amended by omitting the words quoted.

Bankruptcy Act 1914, as amended

The Council considers that the Bankruptcy Act 1914, as amended by the Bankruptcy (Amendment) Act 1926, and the Bankruptcy Rules 1952 should be amended as follows:

Section 4(1)(a)

(12) As suggested above in paragraph 4 (Item 3(a)), the debt owing to the petitioning creditor, or creditors, should be raised from an amount of £50 to an amount of £100.

Section 20(6)

(13) The provision that the office of a member of a committee of inspection becomes vacant if the member is absent from five consecutive meetings of the committee often causes difficulty. Subsection 6 of Section 20 should be brought into line with subsection 5 of Section 253 of the Companies Act 1948, which provides that the office of a member of the committee becomes vacant if he is absent from five consecutive meetings without the leave of his colleagues on the committee.

Section 20(8)

(14) The obligation upon a trustee to summon forthwith a meeting of creditors on a vacancy occurring in the office of a member of the committee for the purpose of filling the vacancy is on occasions superfluous. If, having regard to the progress made in the administration of the estate, the trustee and the committee of inspection are of the opinion that it is unnecessary for the vacancy to be filled, the committee of inspection should be allowed to continue to act provided the number of members is not below the quorum. If it is necessary to fill the vacancy, either because the number of members is below the quorum or because insufficient progress has been made in the administration of the estate, the Board of Trade should be given the power to fill the vacancy upon the recommendation of the trustee and the remaining members of the committee of inspection.

Section 20(9)

(15) If the amendment suggested in paragraph (14) is adopted, a consequential amendment will be required to Section 20(9).

Section 24

(16) In order that letters, telegrams and other postal packets addressed to a debtor may be delivered to the official receiver or the trustee, an order of the Court is required. This section should be amended so that correspondence addressed to the debtor shall be delivered to the official receiver or the trustee automatically on his written application.

Section 26(2)(iii) and 3(a)

(17) In many cases, particularly those which are dealt with summarily, the costs of the bankruptcy are heavy in relation to the assets and it is often impossible for the bankrupt to pay ten shillings in the pound. It is suggested that the amount of ten shillings which appears in this subsection could with advantage be amended to six shillings and eightpence in the pound.

Section 28(1)(a)

(18) This subsection, which provides that an order of discharge shall not release the bankrupt from certain debts including those due to the Crown, should be deleted. The Crown and other excepted creditors should be in the same position as any other creditor.

Section 28(1)(b)

(19) This subsection provides that an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party. In order to give a discretion to the Court to enable it to discharge a bankrupt in such a case the words at the end of subsection 28(1)(c) 'except to such an extent and under such conditions as the Court expressly orders in respect of such liability' should be added to the end of this subsection.

Section 33(1)(a)

(20) There should be an amendment to this subsection so that the Inland Revenue are preferential creditors only for the tax assessed in respect of one of the three years ended 5th April next before the date of the receiving order.

Section 33(1)(b)

(21) A right of subrogation is given by Section 319(4) of the Companies Act 1948 to a lender whose advance is used for the payment of wages, salaries or holiday remuneration, so that he may become a preferential creditor in a winding up in respect of his loan. The lender thus gains a benefit in the nature of an unregistered charge on the assets of the company. The Council approves the omission of any such provision from bankruptcy legislation.

Section 33(8)

(22) This subsection should be amended so that the amount of interest payable is limited to simple interest for five years.

Section 35(1)

(23) The power of distraint which a landlord may exercise after the commencement of the bankruptcy by reason of this subsection should be abolished.

Section 36(1) and (2)

(24) The postponement of a husband's or wife's claim in respect of any money or other estate lent or entrusted to the spouse for the purpose of any business or trade carried on by the spouse should be extended to any money or other estate lent or entrusted to a partnership in which the spouse is a partner.

Section 38

(25) As suggested above in paragraph (4) (Item 3(c)), this section should be amended so that a debtor's essential household furniture should not be divisible amongst his creditors. The aggregate amount of the debtor's tools, wearing apparel, bedding and essential furniture not divisible should not exceed £150 in value.

Sections 40 and 41

(26) In view of the decision in the case re Grosvenor Metal Co. Ltd. (1950 Ch. 63) Section 115(2) of the Companies Act 1947 should be repealed. The effect of the case is that a creditor who has postponed execution and so extended the period of credit given to a debtor may, by applying to the Court, get an advantage over other creditors of the debtor.

Section 42(1)

(27) Under this subsection settlements made before and in consideration of marriage are exempted from the provisions which render settlements in certain circumstances void against the trustee in the bankruptcy. This exemption should be modified so that it does not extend to property acquired after the date of the settlement.

Section 44

(28) This section should be amended so as to nullify the effect of re Seymour (1937, 1 Ch. 668) so that a fraudulent preference made between the presentation of the petition and the date of the receiving order may be attacked. In addition there should be a general strengthening of the position of a trustee in relation to fraudulent preferences; Section 44 does not at present operate satisfactorily.

Section 51

(29) As stated in paragraph (4) (Item 7), the provisions of this section should be extended to cover all kinds of earnings, including the wages of workmen.

Section 62(2) and (3)

(30) These subsections, which state the intervals at which dividends shall normally be declared and distributed, should be deleted as it is considered that dividends should be declared and distributed with all convenient speed.

Section 63(2)

(31) The provisions of this subsection, which require the simultaneous declaration of dividends where joint and separate properties are being administered, serve no useful purpose and the requirement to declare dividends together may be an impediment to the administration of an estate.

Section 69

(32) As suggested above in paragraph (4) (Item 6), a declaration by the Court that the bankruptcy is annulled should reveal any surplus in the bankrupt, without the necessity for any documentary transfer by the trustee.

Section 82(1)

(33) This subsection should be amended so that where the trustee realises assets charged to a creditor, sums paid by the trustee to the secured creditor should not be deducted in arriving at the amounts on which the trustee's remuneration is calculated. Also, amounts distributed to preferential creditors should be included in arriving at the amount on which the percentage on distribution is calculated. The Companies (Board of Trade) Fees Order 1929, Table B, paragraphs IV, V and VI, provides that fees to be taken in the office of any official receiver who acts as liquidator of a company include percentages of property realised for debenture holders and other secured creditors and of amounts paid to preferential creditors and debenture holders.

Section 129

(34) As suggested above in paragraph (4) (Item 3(b)), the amount of £300 in this section should be amended to £500.

Section 130(2)

(35) Because it is difficult to get anyone to apply for appointment as the legal representative of a deceased debtor whose estate is insolvent and because of the delay due to the many formalities required before a creditor is appointed administrator of such an estate, it is suggested that this subsection should be amended so that the requirement to give the prescribed notice to the legal representative would be operative only where a legal representative has already been appointed. This would expedite the administration of the estate in bankruptcy.

Section 130(4)

(36) This section should be amended to make it necessary for a meeting of creditors to be called as soon as possible after an order has been made for the administration in bankruptcy of the deceased debtor's estate, but exception should be made if the estate is of a value which brings it within the definition of an estate to be administered summarily. The procedure for calling a first meeting of creditors, required by Section 13 of the Act in respect of a bankruptcy, should apply to the administration in bankruptcy of the estate of a person dying insolvent.

Section 149

(37) It should not be necessary for an authority given by a corporation to one of its officers to act on its behalf for the purpose of the Act to be under seal; writing should be sufficient.

The First Schedule

Paragraph 7

(38) This paragraph should be amended to provide that the official receiver, or his nominee, should take the chair at meetings called by the official receiver and that the trustee should take the chair at meetings called by the trustee.

Paragraph 16

(39) The need for a proxy to be in the handwriting of the person giving the proxy is obsolete. This paragraph should be simplified and need say no more than Rule 147 of the Companies (Winding-up) Rules 1949.

Paragraph 18

(40) This paragraph relating to proxies given to employees should also be simplified and could with advantage be amended to the wording of Rule 149 of the Companies (Winding-up) Rules 1949.

Paragraph 19(b)

(41) The words 'at a specified rate of remuneration' should be omitted from this paragraph; it is not possible to fix the appropriate remuneration of a trustee until after his work has been done.

The Second Schedule

Paragraph 24

(42) The procedure outlined in this paragraph should be simplified where a creditor agrees that a proof which he has made should be reduced or expunged. The Court should be allowed to act on the written approval of the creditor.

Bankruptcy Rules 1952

Rule 255

(43) This rule is difficult to comply with. It should be amended so that the certified list of proofs and the proofs admitted or rejected are sent to the registrar with all convenient speed, but within three months of the receipt of the proofs by the trustee.

Rule 259

(44) This rule allows a trustee twenty-eight days in which to admit or reject a proof of debt or require further evidence in support thereof. This time limit should be changed to 'with all convenient speed', with a time limit of three months.

Rules 267 and 370

(45) These rules should be amended so that where the declaration of a dividend is postponed, after notice of intended dividend, it would not be necessary to gazette again an intention to declare that dividend.

Rule 349(1)

(46) This rule should be amended to permit a member of a committee of inspection to become the purchaser of part of the estate, without having to obtain the leave of the Court, if he does so by purchasing at a public auction.

Rule 351

(47) This rule should be amended so that a trustee may give an undertaking to the official receiver to discharge out of the first assets coming into the hands of the trustee any balance due to the official receiver on account of fees, costs and charges incurred by him. This would obviate the necessity for the trustee to advance an amount to cover this balance from his own resources.

Rule 353

(48) This rule should be amended so that where there is a committee of inspection the committee should fix the remuneration of the special manager.

Rule 363

(49) Forms generally should be simplified; they should be drafted so as to require no duplication of work. In particular, the cash book for a bankruptcy should be of the same size and on the lines of the forms used in a voluntary liquidation of a company. The form of cash book at present prescribed for a bankruptcy does not allow copies of the estate cash book to be typewritten, or for the book to be sent through the post conveniently.

Rule 364(2)

(50) The submission of a trading account to a member of a committee of inspection once in every month is a requirement which causes difficulty as a member of a committee of inspection usually does not wish to be asked to carry out this duty so frequently. The requirement should be amended so that the period is once in every month or such longer period (not exceeding three months) as may be fixed by the committee of inspection.

(51) The certificate on Form 189 should be amended to read 'we have examined the account with the vouchers and find same to be in accordance therewith and we are of the opinion that the expenditure has been properly incurred'.

Rules 365 and 366

(52) The rate of 3d. per folio might be increased to bring into line with present-day costs.

Rule 372(2)

(53) The trustee should not be accountable for the proceeds of a sale lost by the default of an auctioneer or agent, if the appointment of the auctioneer or agent was approved in writing by the committee of inspection.

New Proposal

(54) Where a debtor holds assets on hire-purchase his trustee in bankruptcy can in practice make satisfactory arrangements with reputable finance companies, but in law the position is not satisfactory as the terms of hire-purchase agreements are usually such that, unless the goods fall within the Hire Purchase Act 1938, the owner has the unfettered right of repossession in the event of default at any time before the date on which the debtor would have been able to exercise the option to purchase. The estate could therefore suffer severely if assets were repossessed when most of the hire instalments had already been paid by the debtor. It is therefore suggested that a provision should be introduced into bankruptcy law whereby the trustee would have the right, in respect of assets held on hire-purchase, to pay the unpaid hire charges up to the date when the agreement should end together with the amount required to exercise the option to purchase, but with an allowance for prepayment.

2nd May, 1956.

EXAMINATION OF WITNESSES

Mr. George Forrest Saunders, P.C.A.	} Representing the Institute of Chartered Accountants in England and Wales
Mr. Charles Maxwell Strachan, O.B.E., F.C.A.	
Mr. Thomas Fleming Birch, P.C.A.	
Mr. Leslie John Henry Noyes, A.C.A.	

Called and Examined

1249. Chairman: Would you care to introduce yourselves? - (Mr. Saunders): On my left I have Mr. Fleming Birch, who is an ex-member of our Council, and a member of our Research Committee, and on my right is Mr. Strachan who is an ex-member of our Research Committee and a present member of our Council. They are the two experts that I have brought with me. Mr. Noyes is the Secretary of our Research Committee.

1250. When you were dealing in your memorandum with the proposals as regards discharge you had before you the original circular which was sent out? - (Mr. Fleming Birch): Yes.

1251. Our ideas on the subject have undergone a certain amount of revision since then. Briefly the effect of what we thought of recommending now is this, that trustees or the Official Receiver could apply for a caveat at any time during two years after the public examination is completed, and if a caveat is entered by the Court the bankrupt comes under the onerous duties of reporting himself, and so on, until he obtains his discharge in the present way. So instead of it being only refused bankrupts who come under those duties, under our scheme it would be caveated bankrupts. Also there is a period of two years during which the caveat can be applied for instead of its having to be applied for on the conclusion of the public examination. All that I think meets some of the points which you have made under paragraph (4)(b) of your memorandum, and I fancy you would agree that it is probably a better scheme than the one which was circulated. - I think we should agree with that.
1252. I see that you think that the Official Receiver should in some cases be obliged to apply for a caveat? - Yes.
1253. Do you think that his discretion in the matter ought to be under any fetter, or that he should have a free discretion? - I think a free discretion. We have said in our memorandum that for offences of a trivial nature he should have a free discretion, but in view of the suggested revision we think he should have a discretion in all cases.
1254. I should think that would be fair. Then you say that you think two years is too short because the administration of the estate may not be complete. Does that matter, because even if the man is discharged the administration of his property goes on in the same way as before? - Yes. It is a little difficult if the estate is not wound up when it comes to the discharge. That is what we rather felt, and there are some cases where the administration does take two years.
1255. Yes, certainly, it might take a very long time. If he is discharged the bankrupt is still under a duty to assist the trustees, and so on? - Yes.
1256. Would it matter very much if the discharge were granted before the estate has been completely wound up? - (Mr. Saunders): It still leaves the possibility of other factors arising.
1257. Yes, it does. - (Mr. Fleming Birch): And that was the point we had in mind.
1258. Mr. Lloyd Williams: You might get cases where realisation might take a very large number of years? - We suggested three years as we did not want to wait until administration was completed. We felt that the extra year would give ample opportunity for discovering any reasons why the discharge should be refused.
1259. The extra year has really got nothing to do with the realisation of the assets? - Not necessarily, no.
1260. It is to test the conduct of the debtor? - Yes.
1261. Chairman: You quite rightly in my view mention there should be some sanction to ensure that the bankrupt will perform his duties if a caveat is entered, and we thought of providing that he could be arrested and indefinitely committed. Would that be adequate, or do you think there should be the specific criminal offence? - I think that would be adequate. It would probably have the result of getting what was wanted.
1262. If I might pass to the existing undischarged bankrupts of whom there are I am told about 40,000 loose in the country at the moment, what we thought of providing was that during the two years after the new Act comes into force either the trustee or the Official Receiver could apply for a caveat, and if no caveat was entered then they should be automatically discharged two years after the passing of the Act. Do you think that is sound? - I think that is pretty well in line with what we say.

1263. That brings us to what you say about monetary limits. I see you want to put up the minimum for the petitioning creditor's debt from £50 to £100? - Yes.

1264. What is your reason for wanting that? - We thought that under the old Act at that time £50 was looked upon as a reasonable sort of sum to enable the creditor to file a petition against a debtor, and we thought that having regard to altered circumstances it was not unreasonable to suggest £100. We have nothing at the back of our mind other than we thought it should be a slightly larger figure than it was forty years ago.

1265. Simply because of the decline in the value of money? - A debt of £100 today is a reasonable sort of sum. If you had £50 today it is rather a small sum under present commercial conditions for a creditor to be able to make a man bankrupt. - (Mr. Strachan): Bankruptcy is a very serious matter.

1266. Certainly. - (Mr. Fleming Birch): And that is at the back of our minds.

1267. Mr. Lloyd Williams: Has not the figure of £50 got some relation to the Debtor's Act of 1869 irrespective of the value of money? - (Mr. Saunders): We did not regard the value of money as being the basis of the increase from £50 to £100. Obviously the difference would be very much greater if that was the reason. We felt making a man bankrupt was a serious step to take and £50 was rather on the low side under current conditions to entitle someone to take such a step and £100 was a better qualification.

1268. Chairman: You want to increase the ceiling for summary cases and you suggest £500? - (Mr. Fleming Birch): Hes.

1269. Do you think that is enough? It is £300 at the moment. One or two witnesses have suggested £1,000. - We considered this very carefully. We did talk about £1,000 at one time, and in the end we thought having regard to the old figure of £300 that £500 was a fair figure, but we are not very much committed to £500 except that we did think that was a reasonable figure.

1270. Mr. Peirce: On what basis did you make your appreciation? - No particular basis, but more or less on the lines that we made £50 to £100.

1271. Chairman: According to what several witnesses have told us there is very little joy for a trustee in a case under four figures. - Very little I should think. - (Mr. Strachan): We are not thinking selfishly. - (Mr. Saunders): I do not think we should be opposed to £1,000. If that is your general view we should have no objection.

1272. You say that the amount of household furniture and so on that the bankrupt is allowed to keep should not exceed £150. Do you think that £100 would be too little? - (Mr. Fleming Birch): I think in these days £100 does not go very far.

1273. It does not go very far, but then it is not a replacement value? - Admittedly. In arriving at this figure we did get a valuer to give us an indication as to what was the figure for essential small things for the house, and the figure he gave was £150. That is why we adopted it. - (Mr. Saunders): After all we are dealing with people in various walks of life and in widely differing conditions.

1274. I see you use the expression "essential household furniture" instead of wearing apparel, bedding, etc. You would like these words in a new Act? - (Mr. Fleming Birch): We think so. We think as conditions are today that you cannot just deal with clothing and bedstead and bedding. You have to leave a table, chairs, and so on.

1275. I never understood why apparently under the existing Act it is assumed that bankrupts can do without tables. - In practice we find it is very difficult to keep to the exact wording of wearing apparel and bedstead and bedding. We thought as conditions are today it was reasonable that we should be allowed to include something in the way of essential household furniture.
1276. I see you do not think the law about after acquired property should be altered. - No, that is our considered opinion.
1277. It is an awful nuisance to the trustee if the bankrupt goes out and acquires something in the nature of a white elephant which automatically vests in the trustee? - He has a power of disclaimer, of course, but it does not necessarily mean that is the end of it if he disclaims. He may have some sort of commitment to meet. This after acquired property is rather a difficult proposition we found when we considered it, and we did not feel after full discussion that we could suggest any amendment of the present legal position.
1278. The suggestion that there should be a statutory repeal of the decision in re Pascoe is after all only putting the clock back to what the law was thought to be before that decision. It is not really making a drastic alteration? - No, that is quite right. What we felt about after acquired property was that if you were going to limit it to what the trustee claimed then a dishonest bankrupt might feel inclined to keep it in the dark for a period.
1279. We were proposing to put an express duty on the bankrupt to disclose any property he may acquire before he is discharged. That will help matters? - Yes, that would meet it.
1280. And he can be arrested if he does not do it. - (Mr. Saunders): We only wanted to make sure that he does, in fact, disclose after acquired property.
1281. If that goes in, he will be under a duty to report any after acquired property. You would then not object to our proposals on this point? - (Mr. Fleming Birch): No.
1282. When you were dealing with money limits did you consider the figure of £5 in Section 23(1)(c) where the bankrupt is liable to arrest if he removes any goods in his possession to the value at the moment of £5. It seems to us that he could not walk across the road with a suit of clothes on his back without infringing that. - I am afraid we did not consider this.
1283. It is obviously ridiculous. Would you like to suggest a figure? We thought £50. - I think that would be reasonable.
1284. You deal in item (6) with the conclusion of the bankruptcy where the debts are paid in full. We have been a little exercised in our mind as to whether the Court should have a discretion to refuse to allow the conclusion of the bankruptcy if the man's conduct has been very bad, or whether it should be mandatory that the Court must allow it in cases where debts are paid in full. What view would you take about that? Expediency points one way and ethics might be thought to point the other. - I am afraid we only considered it from the point of view of the creditor being paid in full. I should have thought the Court ought to have some discretion, even if the creditors are paid in full, against a dishonest bankrupt or an unsatisfactory bankruptcy.
1285. It occurred to me as a possibility that that might be met by the Court being obliged to annul the adjudication, but there could be a provision possibly that the annulment should not effect any criminal liability? - Yes.
1286. Because it just occurred to me since our last meeting that if a creditor has been guilty of the offence of making a false claim he ought not to escape punishment merely because the genuine debts are

- paid in full. Do you think it would be a good idea to say expressly that annulment is not to affect any criminal liability? - (Mr. Saunders): We did not cover that point. We looked at it from the stand point of the assets realisable for the creditors. So long as they were paid we were not concerned with the moral aspect. I think you are probably right.
1287. As regards the main question we ask you as to deeds of arrangement, your answer in effect is simply none, that no provisions are desirable to give the Board of Trade greater control over deed trustees? - (Mr. Fleming Birch): That is so.
1288. We felt rather a difficulty about your proposals for the amendment of Section 3. It is I expect you agree not very easy to strike a fair balance between an oppressive majority and a possible blackmailing minority? - Yes.
1289. What we thought of doing to try and meet that difficulty was to cut down the time for a petition founded on a deed of arrangement to one month. Do you think that would help? - It would distinctly help. The trustee is sitting on the fence for the whole of the three months, and it is a most awkward position. One month would cut it down. The object of our suggestion is to get rid of the danger of a bankruptcy within the three months period.
1290. We also were proposing to introduce a Section which would require the Court to dismiss a bankruptcy petition if it thought that the object was blackmail, or if it thought a receiving order was not in the interests of the creditors generally. - The intention of our paragraph (6) was really to avoid this blackmail position arising.
1291. Yes, but I wondered whether you thought our proposal reached the same goal by a slightly different route. - At the moment, of course, I suppose there is no ground for refusing a receiving order if everything seems formal and in order, but you are suggesting the Court can take into consideration other circumstances and refuse to grant a receiving order?
1292. Yes, we thought that it would be possible that the Court might be satisfied that administration under a deed was better in the interests of the creditors as a whole, and it should be empowered in such cases to disregard the wish of the minority of creditors. - (Mr. Saunders): That would cover the majority wishes which the Court would merely make effective.
1293. Somebody suggested instead of "against the interests of" the general body of creditors, the wording should be "against the wishes of". Which do you think would be better there? - (Mr. Fleming Birch): I should have thought "interests" myself. The Court cannot necessarily have regard to wishes. I would have thought they had to go a little further than wishes.
1294. I was not sure about that. It is easier for the Court to ascertain what people want than what is really in their best interests. - (Mr. Saunders): One is a question of fact, and the other is a question of surmise. The wishes would be more readily ascertained than the interests. I think it would put the Court in some difficulty if they could have regard to the wishes but not the interests.
1295. I should have thought it could more readily ascertain wishes than interests, but I do not know. You are rather divided amongst yourselves about that, are you not, as we are? - (Mr. Strachan): We have not had much time to digest this philosophical point.
1296. You have not, and I am afraid it is very unfair to jump it on you at short notice. - (Mr. Fleming Birch): We just wondered how the wishes would be known to the Court, that is all.
1297. By the trustee saying how the creditors voted. - Our wording was that three-fourths could bind, subject to appeal to the Court.

1298. Mr. Beer: Supposing the Court thought the interests were not in parallel with the wishes, as they might well do? - Yes, that could happen, in which event they could form an opinion as to both and decide which was overriding.
1299. Chairman: "Is not in the interests or is against the wishes of the general body of creditors". If we put both in that would go far enough to meet the case? - That would meet it. - (Mr. Saunders): The double qualification would meet our views.
1300. You have I see glanced at the proposed Section 22(4). The idea briefly is that if the debtor has been guilty of misconduct either before or after the deed of arrangement there should be a limited power to cast the whole proceedings into bankruptcy. The particular case the witness had in mind was one in which the debtor executed the deed of arrangement and then prevented the trustee from taking possession, and did it literally with a shot gun. Do you think some scheme of that sort would be a good idea? - (Mr. Fleming Birch): Yes. We did consider the question as to what was meant by misconduct. It was not very clear to us what would constitute misconduct. It was a very, very wide term but we would consider what you have just said as coming within misconduct.
1301. We rather purposely, if I remember rightly, left it wide, so that the Court would have very full power of deciding what it was and what it was not in any particular case. - (Mr. Strachan): This draft Section does meet one point we regarded as very important. Your proviso at the bottom provides for the carrying on of the same proceedings in bankruptcy so that the same trustee can go on.
1302. I think we would have to have some proviso of that kind or it would be chaotic. - That is so. That is what had caused us some trouble, particularly as the normal practice has been that the Board of Trade in their wisdom did not approve the same trustee in bankruptcy as had been appointed under the deed, and your proposal does seem to meet that point very fully.
1303. You think that some machinery on these lines would be workable with that proviso? - (Mr. Fleming Birch): Yes, I should think so. I see no reason why it should not.
1304. Have you formed a positive opinion about the desirability of a model form of deed to be scheduled to the Act? - Yes, our views are set out in paragraph (7). What we feel is this, that the present arrangement is most unsatisfactory because creditors do not know what is in the deed, whereas if there was a standard form of deed, and a trustee had to intimate if there were any provisions outside the standard form, the creditor would know where he was, which at the present time he does not. Section 17 does not help very much, because that provides that the trustee can pay 20s. in the £ to specified creditors, provided it is authorised in the deed. That does leave a loophole to include a provision in a deed to pay somebody in full. We have had that trouble. A debtor or his solicitor can come along and say "Why do you not pay so-and-so? You have power to do it under your deed". This Section 17 makes it very difficult to answer because we have power to do it if the deed provides it.
1305. Do you not feel if there was a model form there would be some sacrifice of adaptability? - Yes, there would, But I would not see much objection to a standard form mainly concerned with the principles of bankruptcy.
1306. Mr. Emerson: Your suggestion only applies to deeds of assignment and not to deeds of arrangement? - Yes. It could not apply to deeds of arrangement, it must be deeds of assignment. Inspectorship deeds would have to be different.
1307. Or a pure composition? - Yes.

1308. Mr. Lloyd Williams: And your view is that that deed would have to be used? - Yes, definitely.
1309. Although in fact a deed of arrangement is a semi-private contract? - (Mr. Saunders): It might be modified to meet the particular circumstances, but in that case the creditors would have to be advised of the modification before their assent was obtained. - (Mr. Fleming Birch): I am not quite clear whether we are talking about inspectorship deeds or compositions. We meant the proposal to apply to deeds of assignment only. We do think that if there is any departure from the principles of bankruptcy the creditor ought to have the opportunity of knowing that before he assents. At the moment he does not. There may be a proviso in a deed that all suing creditors can be paid in full, which puts the trustee in the position that, if pressed, he might have to do it. The average practitioner does not do it, he tries to find some other way, but it puts him in a very difficult position.
1310. Do you think the creditors would really read the standard form? - The standard form would be recognised as an equitable form whether they read it or not I would have thought.
1311. Chairman: However equitable it is, if they do not read it, they are still as ignorant as they are now? - When we say a standard deed, of course we mean a deed that provides for the normal bankruptcy principles.
1312. Equality amongst others? - Yes. - (Mr. Strachan): You appreciate that whilst we think there should be a standard deed variations should be made to suit particular circumstances. I was not sure if you were feeling that that was a sound suggestion.
1313. I realised that that was your suggestion. Some witnesses have gone even further in favour of an absolutely rigid and unadaptable standard form. - (Mr. Fleming Birch): I do not think that would be practicable.
1314. I doubt it very much. - It does not seem to me to matter if you do have provisions in the deed that on the whole are inequitable as long as they are disclosed. That was really our view on this point.
1315. There would have to be some provision obliging the trustee, if there was any departure from the standard form, to give notice of it? - Absolutely, definitely.
1316. I think substantially we are in agreement with you about what you say about the present Section 16. I wonder if you would be so good as to have a glance at the draft of ours under the new Section 14(2). It is intended to provide for the final winding up of each estate. - I would not object to that. What we are very anxious to do is to get rid of these unclaimed balances which are left with us, and as matters exist at the moment if you have £29. 3s. 11d. in unclaimed dividends which you want to pay into the Court, by the time you have paid some of the legal charges and obligations arising out of the application to the Court, you have not the £29. 3s. 11d. left. The consequence is the trustees do not pay these balances in, although they would like to.
1317. We are providing for these annoying little balances to go into the Bankruptcy Estates Account. You propose there should be a separate account called the Deeds of Arrangement Estates Account? - Not necessarily, as long as there is some procedure to enable us to get rid of these balances.
1318. All you want is to have some receptacle? - That is right, yes.
1319. So it would be, as far as you are concerned, all right if they were lumped into the Bankruptcy Estates Account? - Yes. - (Mr. Saunders): Is it suggested this would apply to outstanding balances at the present time, or only to balances arising after the Act is passed?

1320. I think whenever the deed is executed. - (Mr. Fleming Birch): Then it would mop up a lot of existing balances.
1321. If something of this kind is provided do you want to have interim payments into the account? - No.
1322. It is enough if the trustee can get rid of these things? - Yes. - (Mr. Saunders): Deeds of assignment do not usually last very long.
1323. That brings us I think to the awkward business about the deed trustee being treated as a trespasser and I see you want to amend Section 19 in that connection? - (Mr. Fleming Birch): Yes.
1324. Would it not come better under Section 21? Where the deed trustee is apt to be treated as trespasser is where the deed is avoided by the supervening bankruptcy, is it not? What we were proposing to do there, was to provide that in addition to his expenses the deed trustee is to be paid a reasonable remuneration. - Yes, I see that.
1325. Personally I have never understood why he should not be entitled to that? - No. I think in certain cases he might have been. Where he has taken steps to preserve the assets I think the Board of Trade have occasionally been quite equitable and considered he should have something.
1326. You want, do you not, to cut out the reference in Section 21 to performance of duties under the Act? - Yes, because it only comes down to a few shillings in the way of disbursements.
1327. After "by this Act" would you like to put in the words "or by the deed"? - Yes.
1328. That would meet the case where the deed provided for carrying on the debtor's business and the trustee incurring expenses for which he ought to be repaid? - Yes, quite.
1329. That would meet the case? - Yes. - (Mr. Strachan): Is the suggestion that the question of any point of trespass is now disposed of?
1330. If he is going to be paid his expenses and a proper and reasonable remuneration, that is the end of the trespass business, is it not? - (Mr. Strachan): Yes. The insertion of "as well as his reasonable remuneration" comes after the reference to the Act and I understand you are suggesting it should be "as well as his reasonable remuneration for services under the deed", or words to that effect.
1331. I think just "his reasonable remuneration". - (Mr. Fleming Birch): It is not limited by the words "by the Act" and in that case it would cover services also under the deed?
1332. I thought if the Committee approved the suggestion the Section would read:- "Any expenses properly incurred by the trustee in the performance of any duties imposed on him by this Act or by the deed as well as his reasonable remuneration". I think that covers it? - Yes.
1333. I see you propose that a member of a committee of inspection should vacate his office if he is absent from five consecutive meetings without the leave of his colleagues. That struck me as a very good idea. Would you like to enlarge on it at all? - It rather depends on the amount of work that has been done in a bankruptcy which may be getting somewhere near the end. We thought that we should adopt really what the Companies Act provides, because at the moment you have to call a general meeting of creditors to appoint a new committee man and you have to scour into sufficient places to get creditors to attend or to give proxies to get him on. But if the bankruptcy is three parts finished it does seem to me that, on the recommendation of the trustee and the committee, you might carry on without him.

1334. We were proposing to make it not obligatory in all cases to fill the vacancy. - Yes, that is really what we are after.
1335. You suggest giving the Board of Trade power to fill vacancies if necessary. Do you think the Board of Trade would like that? - (Mr. Saunders): The suggestion was that they should be the confirming authority, because the appointments are originally confirmed by the Board of Trade, and in this instance the recommendations of the remaining members of the committee or the trustee should be confirmed by the Board of Trade, and the appointment not just made on their own authority.
1336. Is the Board of Trade going to like having power to fill vacancies on committees of inspection? - (Mr. Fleming Birch): They have only been asked to approve.
1337. Under your paragraph (14) the suggestion actually is that they should have the power to fill the vacancy. - (Mr. Fleming Birch): It is only on the recommendation of the trustee.
1338. Perhaps that is in effect confirming it. - We do not press that the Board of Trade should be brought in. We only put this suggestion in our memorandum because normally in the first instance the Board of Trade do confirm or approve the committee that is appointed. - (Mr. Strachan): And if it were felt somebody should confirm the appointment we thought it unnecessary to call a meeting of creditors. That is really the point.
1339. In this connection I do not know if you would approve the idea of a postal vote of the committee of inspection, provided they all agreed in writing unanimously to the proposal. That should make it unnecessary to call a meeting? - (Mr. Fleming Birch): I am sure we would, there is no doubt about that.
1340. The approval must be unanimous of course. - (Mr. Strachan): Yes, I should say very definitely it must be unanimous. I have been a minority so often. - (Mr. Saunders): You are only suggesting a postal vote of the committee?
1341. Yes. - Not of the creditors?
1342. No. - A resolution signed by each member would suffice.
1343. I cannot see why it should be necessary to bring them altogether on every occasion. - No.
1344. I notice that you want the postal authorities to be required to deflect letters and postal packages on the written application of the Official Receiver or trustee. Do you not think that is very drastic? - (Mr. Fleming Birch): I would like to say that is what happens at the present time. The postmaster knows you, you send around a notice of appointment, you produce a copy of your appointment and he sends the letters round without any intervention by the Court.
1345. Does he really? - Yes.
1346. It is not what the postmaster's duty is under the Act? - No, I quite agree.
1347. He is supposed to act on the orders of the Court. I must say I can see some village postmasters getting into pretty hot water. - What I say was supported by some of the other members of my sub-committee, and it was for that reason we thought why should you have to go to Court if you can get the letters redirected by producing your appointment to the postmaster.
1348. I can imagine a third party being pretty annoyed if his correspondence with the debtor is deflected without a Court order. You do not think that your experience relates to cases where premises have been vacated and no address left? - No, to the ordinary correspondence

addressed to a bankrupt, normally, of course, at a business address of the bankrupt.

1349. Mr. Lloyd Williams: You must be on very good terms with the local postmaster? - Probably I am, but I was not alone in my experience. I was supported by other members of the committee who experience exactly the same thing.

1350. Chairman: Under Section 26, your paragraph (17), I see you make certain proposals about payment of ten shillings in the pound. What we were proposing was to abolish the Court's power to suspend the discharge until ten shillings in the pound had been paid. That leaves the reportable fact of the assets not being equal to ten shillings in the pound, which is, of course, in operation if the bankrupt can satisfy the Court that it is not his fault that the assets are not of that value? - Yes.

1351. That is fair enough, is it not? - Yes, that would go some way to meet our views.

1352. Your next suggestions are rather novel. I do not think anybody else has made them. Could you explain why you are so apparently keen to relieve swindlers and seducers, and so on, all the people who are not released at the moment by their discharge? - The conclusion we came to about that was if you are going to discharge a man discharge him, do not discharge him with something round his neck. That was mainly the view that we took over these suggestions. It only arises on discharge, and it only affects the bankrupt I suppose, but it did seem to me that if he was entitled to the discharge he ought to have a more or less free discharge and not have certain debts tied round his neck afterwards.

1353. I suppose if your suggested amendment were made the Court would tend to impose long periods of suspension in cases where the man incurred a debt by fraud, or seduced somebody's daughter but ultimately he would get out of it with a clean slate? - You cannot hold it against him for all time, that is what we felt. - (Mr. Strachan): Subsection (c) says "- to such an extent and under such conditions as the court....", which is a very wide power to give to the Court.

1354. I see you suggest the Crown's preference being reduced to one year of the last three. - (Mr. Fleming Birch): Yes.

1355. You would not be in favour of abolishing it altogether? - I think we would.

1356. You would? - Yes, certainly.

1357. It is one thing to be in favour of it and another thing to persuade the legislature to do it. - When we originally discussed this we had the one year ending on the 5th April before the receiving order.

1358. That is the last complete tax year? - Yes, that was our original idea, but it was thought we might not be able to succeed in that, so we have watered it down to one of the last three years, and it would suit us very much if it was that.

1359. At all events you think the degree of preference is far too much at the moment? - Yes. You see the Inland Revenue have got just the same opportunity, or more, to be diligent than the ordinary creditor, and if there is great delay we do feel that unfair, as in that case probably all the estate goes to the Inland Revenue.

1360. Would you be in favour of making wages, what has been called by one witness, pre-preferential in respect of one week; in other words the trustee can if necessary borrow money and pay them out before he pays the other preferential creditors? - I would not object to that, because it does not affect anybody except the other preferential creditors.

1361. Mr. Emerson: It does affect the wage earner who may have to wait months and months? - Yes, but from the point of view of administration of the estate I see no objection to it, because it is only paying one preferential creditor before the others.
1362. Also it may enable you to carry on a business by paying the employees, because otherwise you would have to dismiss them? - (Mr. Strachan): I think on the basis of our general discussion we would welcome that wages should be pre-preferential. - (Mr. Saunders): We do suggest however that it should be limited to the wages for one week.
1363. Mr. Peirce: Would you limit it to £25 or some other figure? - (Mr. Fleming Birch): It would be a bit more today.
1364. Chairman: £25 per person, not an aggregate of £25. It might be a very large business. - I should have thought that would be too high. - (Mr. Strachan): I should have thought that was higher than necessary, but as a limit that should be ample.
1365. Mr. Peirce: Would you like to suggest what limit you think would be more reasonable? - (Mr. Fleming Birch): £20 I would have thought was a fair figure.
1366. Chairman: Why do you want to limit the amount of interest to simple interest for five years? It is not the creditor's fault if he is kept waiting five years? - This arises because in our experience there have been a number of cases where a man has come into a sum of money and he has wanted to pay his old creditors, but in the course of many years the interest has amounted to as much as the debt. Therefore we thought one ought to be a little reasonable in this connection, and after consideration we suggested five years. We find in our experience that there are quite a number of cases where the bankruptcy hangs fire for a very long time because the bankrupt is not able to do anything for his creditors, and then when he is able to do something he finds it is very nearly an impossible task because the interest, over twenty years in some cases, is very large.
1367. Mr. Lloyd Williams: It doubles the debt? - Yes.
1368. Chairman: Of course, the point will be a lot less important if the provisions we are suggesting as to discharge are in operation? - I agree.
1369. That brings us to what you say about Sections 36(1) and 36(2). My own belief is - and I am not committing my colleagues at the moment - that we can very much simplify Section 36 and clear up a few ambiguities at the same time. You will not find this is the book before you because it is not one of our entries. May I read what I was going to suggest about Section 36? It is only a suggested draft at the moment:-
- "No person who was at the time of the loan or entrustment the wife or husband of the bankrupt shall be entitled to any dividend in respect of any money or other estate lent or entrusted by her or him to the bankrupt for the purposes of any trade or business carried on by the bankrupt either alone or in partnership with any other person or persons until all admitted claims of the other creditors of the bankrupt have been satisfied."
- I am glad that you have included "or in partnership". It is so simple at the present time, the wife lends money to the partnership and so avoids Section 36. - (Mr. Saunders): I think it wants to go further. She might lend it to another partner.
1370. She is lending it to all, so it is a joint liability. - (Mr. Fleming Birch): As long as the partnership point is covered that is all we have to say about this.

1371. Would you like the Section extended so as to cover all loans between husband and wife? - No, I do not think that would be quite fair.
1372. I am not suggesting we have the right formula for doing it at the moment but, if a formula could be found, would you like the Section to include people who though not married are living together as husband and wife? I for my part am quite unable to see why a woman who is not married to the man with whom she is living should be able to lend him money on more advantageous terms than her respectable sister next door. - (Mr. Strachan): The Companies' Act calls her "the reputed wife", does it not? - (Mr. Saunders): That seems to be a legal matter. If you could phrase it in that way I am sure we should be satisfied.
1373. You do not see why the mistress should be in a better position in this respect than the lawfully wedded wife? - (Mr. Fleming Birch): No, I would not have thought so.
1374. We could do it by a provision, I think, to the effect that for the purposes of this Section persons who live and cohabit as man and wife should be deemed to be man and wife? - Yes, as long as it covers the partnership point.
1375. On Section 38, do you see any good in retaining the doctrine of reputed ownership in this day and age? - I have very great doubt about it. It is so easy to defeat and has been for many years. I have not come across a case for many years where there has been any chance of succeeding on reputed ownership.
1376. I should have thought it might as well go out of the Act? - I should think so. Everything is sold on hire purchase today which cuts it right out.
1377. On Sections 40 and 41 we were proposing a drastic simplification, the effect of which would be that if the man in possession can hold on, on behalf of the execution creditor, for twenty-one days without notice of petition then the execution creditor has it, but if he gets notice of petition he has to cough up. I think that would be straightforward and would be an improvement, do you not? - Yes, we would accept that.
1378. We were proposing substantially the same thing in regard to distraint whether for rent or rates. That I think would make it unnecessary to deal with re Grosvenor Metal Co. Ltd., would it not? - Yes.
1379. We were all interested in your suggestion about property acquired after the date of the marriage settlement. Do you think it is very important nowadays as marriage settlements are going rather out of fashion, are they not? - (Mr. Strachan): In view of the five years rule people are making big settlements on the occasion of their daughters' marriages.
1380. Do you not think it is rather hard that where there has been a covenant to settle future property in consideration of what is sometimes called the highest consideration known to law the trustee should be in a position to snap up such property? - (Mr. Fleming Birch): I have had quite a lot of experience with these marriage settlements. People are perhaps starting a business and they have a very good time for two or three years. They make a marriage settlement which covers future furniture and then they go and buy a lot of expensive furniture. Then ultimately they fail, having bought that furniture with the creditors' money in effect. - (Mr. Strachan): We do not mind marriage settlements of what exists at the time of the settlement.
1381. It is future property you are concerned about? - (Mr. Fleming Birch): Yes.

1382. I think I follow your point about that. It would not be difficult to make a suitable amendment to the Act? - Quite easy I would have thought.

1383. We found an awful lot of difficulty about what to do about Section 44, so-called fraudulent preference. One thing we were thinking of doing on which we should be very grateful to have your opinion is this; providing that a payment made within three weeks before the petition or after the petition could be set aside without proof of intent to prefer if such payment does, in fact, result in a preference. There will have to be some exception in favour of people who supply necessaries, or something of that sort, but subject to a provision protecting those people would you be in favour of it? - I think I would. In this connection, what we did think of to start with - whether it was practical or not I would not know - is that the onus of proof is always on the trustee and we thought, if the case came to the Court and the Court were satisfied on the evidence that there was a prima facie case of a preference, then the onus should be on the preferred creditor.

1384. You would really like the position as it was thought to be under in re Cohen restored? - The Section is all very well but the preferred creditor and the bankrupt have only got to compare notes and the trustee gets nowhere, it wastes his time. We did not think it was unfair that the Court should be able to decide that, if there was a prima facie case on the look of the thing that there was a preference, then the onus should be on the preferred creditor. Those were our first thoughts. We have certainly whittled it down by saying that Section 44 does not operate satisfactorily. I do not know what the Board of Trade think about this but I think they would feel somewhat the same. With Section 44 as it is it is very seldom you can succeed on it.

1385. The suggestion has been made by some other witnesses that there should be a provision in the Section entitling the trustee to read the notes of the bankrupt's public examination as evidence, provided the bankrupt is called and is subject to cross-examination by the respondent. Do you think that would be a good idea? - It would be helpful but I would not say it would be conclusive. It would help, but I do think if the bankrupt and the preferred creditor are going to tell the same story the bankrupt would say the same thing at his public examination. It does seem to me unfair where if you look at the facts there is deliberate preference and yet you go to the Court and you have the onus to prove what is really apparent and you cannot do it.

1386. Have you any views about the case where the bankrupt's intention is not to prefer the principal creditor but to prefer a surety? Do you think the trustee should be required to go for the surety, or do you think the present position is satisfactory in that he has to go for the principal creditor? - I do not think it is satisfactory but I would hesitate to express an opinion as to how you could put it right.

1387. I think it could be done all right if it is thought to be desirable to make him go for the surety. It does seem to me that it is rather unfair that the risk, with the surety having himself gone bankrupt or fled the country or otherwise escaped, should be on the principal creditor. - Yes, we would be in favour of that amendment if it could be reasonably worded. Of course, arising out of the surety question there is the question of sureties to the bank.

1388. That is what I was thinking of. - That is now got over quite easily. The bank will always claim first, and then go to the surety for the difference. That applies to the wife as well. Whether you could do anything about that if your suggestion is that they must look to the estate, I do not know.

1389. What I am thinking of is a case like Conley where at the last moment the bankrupt brings his account into credit in order to let his wife recover her securities which she has lodged as collateral at the bank. - That happens in many cases.

1390. It does indeed and we were inclined to think that in such cases the trustee should shoot direct at the surety. - We would like that. There are many cases where a bankrupt has ceased to trade for some weeks - when I say ceased to trade, I mean he has paid nothing to his creditors during this period but put the whole of his cash receipts into the bank - and the Court says:- "Where do you think they could be put but in the bank?", and the effect is to release the sureties.
1391. In the case of Conley he ceased to pay his creditors and simply realised goods at miles under cost in a desperate effort to get some money into the bank to let his mother and wife out. - I suppose you could not bring this in as a preference? It is not a preference at the moment because the bankrupt does not pay the surety, he pays the bank.
1392. We could. We were thinking of putting in a proviso that where the intention was not to prefer the principal creditor but the surety the trustee must go to the surety. I think it is fairer than the existing provision? - Yes, I quite agree.
1393. Is it your experience that the provisions in Sections 62(2) and 62(3) about the intervals at which dividends are to be paid out do any harm in practice? - They may not do any harm but are they adhered to? I would not say they were.
1394. They are just pious hopes? - Yes. As they are not adhered to we thought we would make it quite open so that you could pay your dividend as soon as you were ready. - (Mr. Strachan): We have not got strong views on that? - (Mr. Fleming Birch): No.
1395. I can see that the obligation to pay joint and separate dividends simultaneously may be an impediment. Have you come across cases in which that has happened? - I must say I personally have not, but if you pay the two dividends together and you have one estate ready you would have to hold that until you could pay both dividends together. That is the only important impediment really, but if there is a joint and a separate estate and the separate estate is ready why should you hold it up until the joint estate is ready?
1396. You do not think it serves any useful purpose? - No, I do not. - (Mr. Strachan): Nor do I.
1397. On Section 82(1) you suggest sums paid to a secured creditor should not be deducted from the amounts on which the trustee's remuneration is calculated. What do you say about sums paid to preferential creditors, should they be deducted, or not? - (Mr. Fleming Birch): No, they should be dealt with the same as in the Companies Fees Order.
1398. Do you think that the percentage bases really matter very much? What in effect happens I gather is that the committee of inspection, or whoever fixes the remuneration, works out a lump sum and then calculates it back into a percentage in order to comply with the Section. - That is what happens in practice. Of course, the main thing is that these percentages must have some reasonable bearing on the realisation of the estate.
1399. Would you be in favour of direct permission to agree a lump sum? - As far as the Institute are concerned they are, of course, very averse to percentages, in other words, they do not like charges calculated on results, but they have had a long consideration of this matter and they have come to the conclusion that in bankruptcies there is no reasonable alternative to anything but percentages. - (Mr. Strachan): The difficulty arises principally in the smaller estates where a lump sum which would be necessary for the work put in would completely swamp the estate.
1400. Which would be rather an argument for putting a high ceiling for summary cases? - (Mr. Fleming Birch): If there was a scale of fees it would have to be a graduated scale because unless there was there would never be a dividend in a small estate.

1401. Mr. Emerson: We have had a suggestion that the trustee's remuneration should be based not only on the trustee's realisations but also on the realisations effected by the Official Receiver before he hands over. - In certain cases, of course, that is highly important. Some Official Receivers do not take any steps to realise the property while other Official Receivers collect all the debts as soon as they can before they hand over to the trustee, who then has to do his work and has not an adequate sum upon which to base his percentage.

1402. Chairman: What tends to happen is that the Official Receiver tends to collect the really ripe plums that drop into his lap and the ones that are really difficult and require a ladder to pick the unfortunate trustee has to deal with? - (Mr. Strachan): I think we agree with the suggestion that these amounts should be included for the very good reason you have just put forward that the Official Receiver normally just takes the things that are no trouble to collect, or very little.

1403. It would meet the case if all those things he collects were included in the percentage basis? - Yes. - (Mr. Fleming Birch): This point is really not very material, when you consider it all comes back to the percentage. If you do allow the percentages to be calculated on preferential creditors and on secured creditors, in the end, of course, it will still have a percentage calculated to secure the trustee a reasonable amount of remuneration.

1404. Mr. Emerson: It might make your percentage look a little less ridiculous in small cases? - (Mr. Strachan): Yes, the look of the percentage is not without its importance.

1405. Chairman: As regards your first point on Section 130, we thought of empowering the Court either to direct service on a particular person or to dispense with service altogether if there is no administrator in the saddle. - (Mr. Fleming Birch): Yes, that would help.

1406. You do not think it would meet the case altogether? - Well, it is just a question of time. Time is rather the essence in getting on with a deceased's estate. Would the Court be able to hear the application pretty promptly, or would there be much delay?

1407. I think the Court generally hear applications of that sort very quickly indeed, do they not? - They do in the Provinces, quite quickly.

1408. I have been rather puzzled as to how there could effectively be a first meeting of creditors under Section 130(4). They have no statement of affairs to work on and cannot have because the man is dead. - There are meetings of creditors of live bankrupts when the statement of affairs is not available at the first meeting, and that statement comes later.

1409. You would only get a meeting of creditors summoned by advertisement, would you not? In many cases as you would have no material to work on? - I would have thought the creditors' names would be available even with a deceased's insolvency.

1410. If he keeps books I suppose they would. - In most of the cases I should think there would be correspondence to show that there were creditors, as the creditors had probably been creating some disturbance about why they were not paid. I would not have thought that was very difficult. What we are after really is this; if a deceased's insolvency is going to be dealt with as a bankruptcy we think you ought to take the usual steps and call the creditors together. That is all our suggestion amounts to.

1411. I take it you would not suggest the holding of a seance in order to obtain a statement from the deceased insolvent! - At the moment, with the estate of a deceased insolvent there is no meeting of the creditors.

1412. You would simply have to ascertain then who the creditors were as best you could in the particular circumstances? - Yes, I think that could be done. - (Mr. Saunders): It would be possible to find some nucleus to start off with anyhow.
1413. Do you think it very important that corporations should be able to authorise their officers to act by writing instead of by affixing their common seal to a document? - (Mr. Fleming Birch): We do not attach too much importance to that but what happens, of course, is that if you interpret it strictly I should think a large number of proxies and proofs are out of order. We are trying to put this right. Our view is that if you are going to recognise that position today you might as well say so.
1414. You would have to put in some provision as to who is to sign this authorisation on behalf of the corporation, would you not? - Why not the cashier, the secretary or clerk if he is in regular employment?
1415. Signed on behalf of the corporation by any person in its permanent employment? - That is what is happening, I am afraid. The proofs of debts state that those submitting them are duly authorised and I can guarantee that a very large number are not duly authorised. - (Mr. Strachan): Normally you have to call a directors' meeting to get the seal affixed.
1416. Mr. Lloyd Williams: Would it not be sufficient if a resolution was duly passed by the directors under the seal of a company authorising Mr. A. to deal with the whole of the matters in bankruptcy? You have to get your authority under seal to present a petition. If as a result of that a receiving order was made and a bankruptcy ensues, surely that first resolution should be sufficient to cover any other steps done by that gentleman so that you do not require a fresh authorisation for each step he takes? You could have a general authority to sign all necessary documents in the bankruptcy proceedings. That would cover your point, would it not? - (Mr. Fleming Birch): You could, I think, go further than that. The board could authorise Mr. A. and Mr. B. to deal with all proofs of debt in bankruptcies.
1417. Chairman: In bankruptcies generally? - Yes.
1418. Mr. Lloyd Williams: It can be done? It is not difficult? You do not need a resolution of authority for each step? - No.
1419. That would be a way out of your present difficulty? - Yes. We only called attention to these two points because in practice they are not carried out. The proofs are wrong and sometimes the proxies are wrong.
1420. Chairman: That brings us to your last point in regard to hire purchase. It struck me, and I think it struck some of the rest of us, that what you are really asking for is an amendment to the Hire Purchase Act, 1938, rather a different thing to the amendment of the Bankruptcy Act? - Yes. We want power to be given to the trustee to pay off the hire purchase agreement. We are bound to admit that in practice the hirers are very fair about it but they need not be.
1421. Then would not the appropriate remedy, if there is one, be an amendment to the 1938 Act, which is the Act dealing with hire purchase transactions generally? - I agree, it is a hire purchase question really.
1422. There are just one or two other matters I wanted to ask you about. Do you see any need to alter the law in regard to the doctrine of relation back? - You mean it should be the date of the petition or the date of the deed of assignment?
1423. That is what I had in mind. - We discussed that and we have come to the conclusion that we would see no objection to the date of the petition or of the deed of assignment being substituted, whichever is the earlier, for this reason that when a man makes a deed of assignment in effect he fails. The bankruptcy comes along and supersedes the deed but

the fact remains that he has failed at the date of the deed and, therefore, this relation back surely should be from that date because that is the time of the failure?

1424. It would be better for the creditors, would it not, if the present arrangements were left unaltered in cases where a man had committed some act of bankruptcy entirely independent of the deed but before the deed and still within three months of the petition? If the creditors could get authority to go even further back than the deed it might be very much to their advantage? - Yes. The effect of a deed of assignment is that the man has failed and surely it is his transactions prior to that date that want looking into, not necessarily transactions in the period of six months prior to the presentation of the petition, because if the petition is put on after the deed has run for two months there are two of your valuable six months gone under the present arrangement.

1425. And if we cut it down to one month from the deed then there is even less time? - Yes, even less time, I agree. - (Mr. Saunders): A shorter time must elapse before you must enforce the bankruptcy proceedings, one month instead of two. We thought that was a good suggestion. Our only concern was that we were not aware that you were proposing to set right the trustee's position under the deed, but now that we have your assurance on that we think your present suggestion of amending the relation back is a good one.

1426. It has been suggested to us that it should be so amended. I do not think we have committed ourselves to it. - We thought the suggestion was a good one and the Act should be amended so that the operative date is brought back to the date of the deed.

1427. I am still rather puzzled about this. Supposing the order of events is that the debtor commits some act of bankruptcy, for example he begins to keep house; then a month or so later he executes a deed, and then the creditor puts on a petition within the month and gets a receiving order. Why should the trustee not go right back to the date when the man began to keep house? - (Mr. Fleming Birch): You mean, keep it as it is at present, the presentation of the petition or the first available act within the last six months?

1428. It is three months actually, I think. - And then make it the date of the deed or the first act of bankruptcy prior to that? That is all right.

1429. I think the Section is all right as it is? - Yes.

1430. Would you like some sort of provision, if we can devise it, which would prevent people like the Electricity Boards or the Gas Boards, and so on, demanding payment of a debtor's account as a condition of renewing the supply to the trustee? - Yes, we would, very much.

1431. You have suffered from that? - Yes, more so since we had the nationalised industries. They are much more difficult.

1432. It has got worse instead of better? - Yes. The same principal applies presumably to a deed of assignment. Is it suggested that these powers should be given to a trustee under a deed?

1433. We were thinking only in terms of bankruptcy but now you mention it there is no reason why what is sauce for the goose should not be sauce for the gander, and we ought to put some provision in both Acts. - Yes. The same problem arises on both.

1434. I think that was all we wanted to ask you. Thank you very much, Gentlemen, for your helpful memorandum and evidence.

(The witnesses withdrew)

TWELFTH DAY

Monday, 9th July, 1956

Present

HIS HONOUR JUDGE BLADEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER I.S.O.	

LETTER AND MEMORANDUM SUBMITTED BY

THE GENERAL COUNCIL OF THE BAR OF ENGLAND AND WALES

29th March, 1956.

B. MacTavish, Esq.,
Joint Secretary.

Dear Sir,

Bankruptcy Law Amendment

With reference to your letter of 2nd November, 1955, I now enclose 20 copies of a memorandum approved by my Council for submission to the Bankruptcy Law Amendment Committee.

This memorandum was prepared by a Special Committee appointed by the Council. There have been deleted from it recommendations under two headings - 'Conduct of Prosecutions' and 'Private Companies', which were not adopted by the full Council which considered the memorandum on 26th March.

It is possible that a supplementary memorandum may be submitted on Section 38 of the Bankruptcy Act 1914.

Yours faithfully,

(Sgd.) W.W. BOULTON

Secretary.

BANKRUPTCY LAW AMENDMENT

We have considered the proposed amendments set out in the Board of Trade memorandum dated 2nd November, 1955 and Appendix, and offer the following comments, which are numbered in conformity with the items in Paragraph 3 of the memorandum. Reference to sections are to the Bankruptcy Act, 1914 except where otherwise stated.

(1) Discharge (read with Appendix)

(i) We are of the opinion that the proposed radical reconstruction of the discharge procedure, which the draftsman of the Appendix has not supported by argument or evidence directed to supposed defects of the present procedure, would be undesirable and in practice unworkable.

(ii) We are aware that there are considerable numbers of undischarged bankrupts "at large" in the community, and as regards this group, we agree that some statutory procedure should be introduced to bring their cases before the Court for disposal, and we make some suggestions on this aspect below in the second part of this memorandum.

(iii) As regards the proposed scheme which applies only to future bankrupts, we would observe that the public examination takes place in the vast majority of cases very shortly after the receiving order (s.15 (2)); the debtor may not have been adjudicated, and if he has been, the trustee (where he is not the Official Receiver) will have only just been appointed, and will not have been able to take full seisin of the bankrupt's estate and affairs, since all the books and papers will be with the Official Receiver for the purposes of examining the statement of affairs. Some creditors may not yet have filed proof of debt and accordingly cannot take part in the public examination (s.15 (4)). The examination may of course be adjourned for further enquiries, particularly for the benefit of the trustee.

(iv) The true picture of the bankrupt's conduct, including an ascertainment of the "facts" material for his discharge as set out in s.26 (3), and of possible bankruptcy offences, and of the bankrupt's fraudulent or voluntary or otherwise voidable transactions, may not, and in many cases will not, become clear until after an exhaustive enquiry by the trustee and his solicitors and the creditors, which may entail private examinations under s. 25 and the initiation and conclusion of proceedings to recover assets disposed of by the bankrupt. Such steps are often an inevitable prerequisite for ascertaining the size of the dividend to be paid.

(v) A material factor in considering a bankrupt's right to discharge is his conduct since his adjudication (s.26 (2)) and the extent to which he has co-operated with his trustee and has made or can make in the future during a period of suspension (s.26(2)) proviso (iii) and (iv)) contributions out of his earnings, and the extent to which his assets have been increased by the accrual of after-acquired property. A bankrupt may often redeem his character in the eyes of the Court - by "working his passage".

(vi) There could, in our experience, be few cases where it would be possible, and equitable both in the interests of the bankrupt and of the trustee and the creditors, and of the public to arrive at any concluded view as to the bankrupt's right to discharge, or even the right to apply for a discharge, at so early a date as the conclusion of the public examination, if concluded in due course, or within a short time thereafter.

(vii) Since the automatic discharge after two years could only be prevented by the entering of a caveat at the conclusion of the public examination, it is probable that in the majority of cases either a caveat would be entered as a matter of course, or the conclusion of the public examination would be deferred for a substantial period, to enable sufficient material to be accumulated for deciding whether a caveat should be entered. No reference is made to the trustee himself entering a caveat, although he is at present entitled to oppose a discharge.

(viii) Provision would also have to be made for revoking the bankrupt's vested right to an automatic discharge, where no caveat had been entered, in cases where it was later proved that the bankrupt had failed to disclose creditors, or had concealed assets.

(ix) The basic evidence for a discharge application is the transcript of the notes of the public examination, which may be voluminous, and which are not admissible against the bankrupt until he has checked and signed them, after correcting them where necessary. It would seem likely to be difficult for any party including the Court, to make use of the transcript until after the expiry of a reasonable period after delivery by the shorthand writer.

(x) For the reasons we have stated, we do not support the proposed scheme.

(2) Subsequent bankruptcies

After-acquired property in the bankruptcy vests automatically in the trustee (s.38 (a)) but upon a second bankruptcy it vests in the second trustee, so far as it has not already been distributed, and the first trustee proves in the second bankruptcy for the unsatisfied balance of the debts provable in the first bankruptcy (s.3 of the 1926 Act.) We agree that there may be a case for postponing the first trustee's claim to prove for that balance. The justification in equity for such a postponement is, we assume, that the creditors in the second bankruptcy have dealt with, and given credit to, and augmented the after-acquired assets of, the bankrupt, on the faith of his apparent possession of his after-acquired property, which in law belonged to his first trustee, and accordingly the first trustee who has not reduced that property into possession, should be subject to a quasi-estoppel and should not compete with the subsequent creditors. Such a proposition however implies that the first trustee knew, or had means of knowing, of that property which in the vast majority of cases is not the case; we are of the opinion that this problem can be resolved, and such a postponement justified, if, and only if, the bankrupt is made to disclose his after-acquired property at regular intervals, so that his first trustee can claim it, and subsequent creditors may not be induced to rely upon it. This matter is further considered below, under Paragraph (4).

(3) Monetary Limits

The existing monetary limits, and our view thereon, are as follows:-

S.4 (1)(a) £50 minimum for presenting a petition by a sole creditor, or creditors, in the aggregate. The figure prior to the 1869 Act was £100. Having regard to the altered value of money, and the relation between the costs of a petition (£35 minimum) and the petition debt, we feel there is a case for increasing the minimum to £100, although the usefulness of bankruptcy proceedings as a means of enforcing payment by a debtor who may have no tangible assets, must not be lost sight of.

S.38(2). £20 maximum for tools of trade, clothes and bedding of bankrupt and family, excluded from vesting in trustee. This limit is not in practice adhered to rigidly; we feel that there may be a case for increasing this to £50.

S.41(2). Execution for a judgment exceeding £20; Sheriff's duty is to retain proceeds of sale or money paid for 14 days. We feel that in view of the altered value of money, there is a case for increasing this to £50.

S.105(1) Proviso: £200 limit for county court jurisdiction in matters not arising out of the bankruptcy. This figure, when fixed, was twice the limit of the ordinary county court jurisdiction. In view of the recent increases in the limit of that jurisdiction, we would advise that this figure be increased to £500.

S.129 (also BR.384). £300 limit for summary administration. We advise that this be left unchanged.

S.154(1)(4); £10 offence of fraudulent concealment of property;

S.155(a); £10 offence of incurring credit without disclosure of bankruptcy;

S.159; £20 offence of fraudulent absconding with property;

We do not think there is any case for increasing these figures.

Monetary limits and obligations prescribed in terms of money are also to be found in the Bankruptcy Rules, viz. R.8 (1) (g): appeals against rejection of proofs exceeding £200; R.127(a): no appeal without leave where money or money's worth involved does not exceed £50; R.129: £20 security for costs of appeal; R.146 deposits of £5 or £7.10. on presenting petition; R.158, deposit of £5 for appointment of interim receiver; R.298 (9) and (11): summary jurisdiction - creditors not exceeding £2; R.384 see s.129 ante.

Except as to the deposit for interim receivership (R.158) we do not think there is any case for increasing these figures. The deposit of £5 to be made by a petitioning debtor (R.146) might perhaps be reduced or abolished.

(4) After-acquired Property. (I) Under the present statute and case law, after-acquired property vests automatically in the trustee, but the bankrupt can confer a good title to it in favour of a purchaser dealing with him bona fide and for valuable consideration before the trustee "intervenes"; such intervention is irrevocable except in cases of mistake as to title. Bona fide in this connection does not mean that the purchaser is unaware of the bankruptcy.

(ii) No diminution of the trustee's vested rights to after-acquired property would be equitable unless the bankrupt is placed under a duty to disclose his post-bankruptcy affairs at regular intervals, since the trustee cannot claim the property unless he knows of its existence. Such a duty is already imposed by B.R.236 in cases where a discharge is granted subject to a condition of judgment being entered against the bankrupt or of payments being made out of his future earnings or after-acquired property; in such cases the bankrupt must inter alia file not less than once a year a sworn statement of his after acquired property or income.

(III) We would recommend the extension of the B.R.236 procedure to all undischarged bankrupts, though possibly at longer intervals than annually, unless the Court shall otherwise direct, or the trustee agree. This would not only obviate the difficulties arising in subsequent bankruptcies, discussed under Paragraph (2) above, but would also prevent the bankrupt from dissipating his after-acquired property without limit of time before detection. It would also tend to reduce a distressing type of case, where an undischarged bankrupt dies, leaving a widow and children who are unaware of the bankruptcy and find themselves suddenly penniless by reason of the claims of the trustee, who has by then become aware of the deceased's after-acquired property. The periodical accounting by the bankrupt could also be linked with our proposals for reviews for the purposes of discharges, considered below.

(IV) Any restrictions on the trustee's rights would also require to be counterbalanced, in our view, by a requirement, strictly to be enforced, that any change of name by a bankrupt whether by deed poll or unofficially

or by marriage and any change of address should be registered in the bankruptcy registers, and notified to the Official Receiver and trustee. This point was highly material in the case of Sidney Stanley, an undischarged bankrupt who had changed his name.

(V) Having regard to the character of many bankrupts, the new duties herein contemplated might need to be reinforced by penal sanctions.

(5) Official Receiver Trustee in Non-Summary Cases

(i) We are of the opinion that this could be done under the present law, since the creditors may appoint "some fit person" (s.19(2)) (which should include the Official Receiver) and if they do not, under ss.19(1) or 20, appoint a trustee at all the Board of Trade may, under s.19(6) itself appoint a "fit person" (which should include an Official Receiver cf. s.71(2)) to be trustee, subject to the creditors' right to substitute a trustee of their choice.

(ii) We would however regard the proposal as of questionable utility, in view of the already considerable demands on the Official Receivers' Department which may be increased under the Board of Trade's proposals or our own; it would be necessary to provide that the Official Receiver could decline the appointment, and the Official Receiver's views should in our opinion be deferred to in this matter.

(iii) There is however the case where it would be beneficial, viz. where there is a serious conflict between creditors as to who should be appointed, or where the bankrupt apprehends that his principal creditor, will appoint a trustee unlikely adequately to enforce the bankrupt's rights or to protect his interests; the appointment of the Official Receiver in the latter case has been intimated by the Court of Appeal to be a possible solution.

(iv) We are informed that the Official Receiver has on one occasion been appointed by the creditors.

(6) Conclusion of the Bankruptcy

(i) Under the present law (s.69), the bankrupt is entitled to the surplus, which in so far as it consists of money or other property passing by delivery or by instrument under hand can be handed over to him. If however surplus assets include land, it is not clear what steps are necessary to re-vest the land in the bankrupt. The trustee's title to the land is constituted by the order of adjudication coupled with his appointment and certification by the Board of Trade (ss.18(1), 19(4) and 53) and the certificate may be enrolled as a conveyance or assignment (s.53(4)); the property passes from trustee to trustee without any conveyance, assignment or transfer (s.53(3)). Upon an annulment (s.29), the Court has the power to appoint the bankrupt's property to any person, and in default of such appointment it reverts to the bankrupt (s.29(2)). When an adjudication is annulled, the Court may make an order permitting the vacation of the registration of the petition and of the receiving order in the Land and Land Charges Registries (B.R.224 and Form 104).

(ii) In the absence of an order of annulment, there is therefore no machinery for vacating such registrations, which in the case of registered land constitute the root of title. The bankrupt can clearly call for a conveyance, since the trustee holds the surplus in trust for him and presumably under s.148 such a conveyance is exempt from stamp duty. It might however be desirable to provide, by Rule, that upon proof of payment in full, an order may be made for the vacation of such registrations, irrespective of annulment, or for formal re-vesting by way of statutory conveyance, as under s.21(2).

(iii) Except for the purposes of dealing with land, we are unable to give any practical meaning to the term "conclusion of the bankruptcy" as distinct from discharge or annulment. If the bankrupt is not discharged,

he must presumably still remain liable to the penal sanctions and civic disqualifications. His trustee will have been released, and the Official Receiver will be trustee ex officio; upon payment in full, we assume that the file would be put away. Furthermore, we would regard it as extremely improbable that upon payment in full, the bankrupt would not seek to exercise his right to apply for an annulment; if that is refused, on grounds of misconduct, he is usually regarded as entitled to an immediate discharge. There would however be no theoretical objection to the Court being empowered to make an order "declaring the bankruptcy closed", but it would serve little practical purpose.

(7) Orders against after-acquired earnings.

(1) s.51 empowers the Court to make an order providing for the payment to the trustee (1) of a portion of the bankrupt's pay or salary as a servant of the Crown, or (2) of a portion of his salary or income "other than as aforesaid". There have been a large number of decisions on the construction of subs. (2) and redrafting would be desirable particularly to bring clearly within the subsection the prospective earnings of a professional self employed man, and the wages of "workmen", who are now much more highly paid than at the date (1891) of the last reported case on the point, and also to make the trustee's share payable in all cases (if the court thinks fit) at source, and to determine whether a covenanted annuity payable to the bankrupt is "property" falling within s.38 (a) or "income" falling within this subsection.

(9) Deeds of Arrangement Act, 1914.

(i) A deed of arrangement differs from bankruptcy in that it constitutes a private contract between the debtor, the trustee and the creditors. The control of, and the power directly to intervene in, the administration at present conferred on the Board of Trade is confined to compelling, by civil process, the proper filing and distribution of accounts by the trustee (ss.13 and 14, and D. of A.R.38) and to punishing by criminal process the failure to file such accounts (s.13), the payment of creditors otherwise than rateably (s.17), the failure to provide security (s.11), administering the deed when it is void or when security has not been given (s.12), and the failure to notify the creditors that the deed is void (s.20). The Board can also be moved by a majority of creditors to intervene for the audit of the trustee's accounts (s.15).

(ii) It is in our view desirable that some further powers should be conferred on the Board, either for direct intervention suo motu or upon application by creditors. Under the Bankruptcy Acts the Board has power to remove a trustee, subject to appeal by the trustee or the creditors (s.95 (2) B.A.), to review his remuneration on application by one quarter of the creditors or by the bankrupt (s.82 (2)), to enquire into the trustee's conduct generally (s.84), and to withhold his release if a creditor objects (s.93). Furthermore, all bills of persons employed by a trustee in bankruptcy must be taxed, and unless so taxed cannot be allowed in the trustee's account (s.83(3)). We consider that some or all of these powers of the Board should be extended to the Deeds of Arrangement procedure, either absolutely or contingent upon complaint being made to the Board by one creditor or some fraction of the creditors less than a majority.

(iii) S.23 of the present Act; which permits debtors or creditors to move the Court in matters arising out of a deed, does not include the Board of Trade; an amendment to that section to include the Board for certain specified purposes, might suffice.

This concludes our observations on the specific points in the memorandum. We now append our own suggestions.

Discharges

(i) We are in favour of a periodic review, and a discretion to grant discharges in invitum in appropriate cases, so as in due course to eliminate the great mass of existing undischarged bankrupts; this would be in their own interests and in the interests of society generally, and can conveniently be combined with the review of after-acquired property discussed in Paragraphs (2) and (4) above.

(ii) We suggest that all undischarged bankrupts be compelled (and compellable) to report to the Official Receiver or (if still in office) his trustee three years after the date of his bankruptcy and every succeeding third year (with suitable transitional provisions relating to those made bankrupt before the coming into force of the Act), and that the Official Receiver should bring every bankruptcy in which a discharge has not been granted before the Court after the expiry of six years from the order of adjudication.

The Court should have power to grant a discharge, or make any other appropriate order, even though the bankrupt has not been served with notice of the application. The cost of serving creditors with notice could be defrayed in advance by increasing the stamp on the proof of debt from 1/6d to 2/6d.

(iii) Transitional provisions would be needed to deal with the great mass of existing bankrupts, said to number 30,000, and the Court should have power to avoid congestion by extending the six year period and to decide on an ex parte application by the Official Receiver to the Registrar in chambers that there was prima facie no purpose at that stage in fixing a day for a hearing in Court.

(iv) It must be recognised that any such scheme, and in fact any scheme for extending control over bankrupts, might necessitate an increase, at least temporarily, in the man power of the Official Receiver's Department and might necessitate a temporary increase in the number of Registrars.

General Amendments of the Act

S.18 Adjudication

The powers conferred by the Rules to adjudicate, in extension of the grounds in this section, were recently considered and upheld as intra vires, on technical grounds; and we recommend that those additional powers be written into the Act.

SS.40, 41. Execution

These sections have proved "fruitful mothers of litigation" and require complete redrafting and codifying with the reported decisions; their purport has been further obscured by the discretionary power, to override "the rights conferred upon the trustee" thereunder, enacted in s.115 (2) of the Companies Act, 1947. These sections should also apply (as is not the case at present) to administration of deceased insolvents' estates under s.130.

S.42 "Voluntary Settlements". This section does not, but should, extend to the avoidance of such settlements in the administration of deceased insolvents' estates under s.130.

S.44 "Fraudulent preferences". The extension of the period of three months to six months (s.115 (3) of the Companies Act, 1947) should be written into the Act. We are also of the opinion that there is a case for extending the scope of "persons preferred" beyond "creditors", or

"sureties or guarantors for creditors", to other persons, who (and not the creditors) were the true object of the bankrupt's bounty. The inclusion of sureties and guarantors was itself an extension of the previous Acts, being first enacted in the 1913 Act.

Ss.45, 46 and s.4 of 1926 Protection of bona fide transactions. S.46 first introduced by the 1913 Act, is anomalous, in that (contrary to s.45) it protects transactions done with notice of an act of bankruptcy. The sections should be combined to state a consolidated code. S.4 of the 1926 Act was introduced in an attempt to remedy the injustice to bankers of Re Wiggall (1921) 2. K.B.835, but is replete with difficulties, including an apparent circuity of process. It has never to our knowledge been construed by any superior Court.

S.54. Disclaimer. Considerable obscurities arise in practice as to the operation of this section and of vesting orders to be made thereunder, which we cannot here set forth in detail; we recommend the section for re-examination and re-drafting.

S.100(2) Transfer of proceedings. It is occasionally desirable to transfer a motion in a bankruptcy from one court to another, but this is not possible, since "proceedings" in this subsection means the whole of the bankruptcy; the power to transfer a motion should be conferred.

S.130. Deceased insolvents. In Re a Debtor (1939) Ch. 594 it was held that this section could not be invoked unless there were a personal representative on whom the petition could be served (subs (2)). This is a serious obstacle, rendering ineffective inter alia the provisions of Rule 305, and should be removed.

S.147. Service of Notices. At present, a notice of motion cannot generally be served out of the jurisdiction; as this is the mainstay of bankruptcy process, service out of the jurisdiction should be permitted.

EXAMINATION OF WITNESSES

Mr. Claude Henry Duveen, Q.C.	}	Representing the General Council of the Bar
Mr. Charles William Chandler		
Mr. Muir Hunter		
Mr. Arthur Figgis		

Called and examined

1435. Chairman: I am going to supply you with two books; one contains our draft amendments so far to the Bankruptcy Act, the other our draft amendments to the Deeds of Arrangement Act. The amendments there are not final - we are still open to conviction. I would therefore ask you to treat them as confidential.

1436. I think the main differences between the discharge scheme as originally framed and the summary which has just been presented to you are that in the case of future bankruptcies the caveat can be applied for at any time within two years of the public examination, and that the person who is saddled with the duties of reporting and so on is not the refused bankrupt but the caveated bankrupt. I think you would agree that goes some way towards meeting your objections? - (Mr. Duveen): Yes, without doubt.

1437. The scheme generally as regards present undischarged bankrupts is that there would be two years from the passing of the Act during which a caveat may be applied for and, if not applied for, the bankrupts escaped at the end of the two years. We hoped that would to some extent separate the sheep from the goats. - (Mr. Muir Hunter): I am sure that some consideration has been given to the machinery laid down for operating this scheme. It crosses my mind to wonder whether in relation to paragraphs A2 and equally B1, of the amended scheme, that is to say the ex-parte application for a caveat as opposed to the application for a caveat under B1 at the conclusion of a public examination, when one may postulate that all creditors are present or aware of the proceedings, it is intended that the intention to apply for caveat should be circulated to the creditors concerned, namely all creditors, so they may attend and if necessary support the proposal.

1438. We had not thought of making it necessary to circulate creditors. We did contemplate that notice in each case would have to be given to the bankrupt. Do you think there should be a circular to all creditors? - In so far as the discharge has repercussions upon the interests of the creditors generally, in relation to the bankrupt's acquisition of after-acquired property, or suspicion thereof, it seems to me that all creditors would have an interest in supporting the application for a caveat against what might be a very plausible bankrupt. In the case of discharges, or renewed applications for discharges, the debtor is required under the present procedure to deposit with the Official Receiver such funds as will permit both of advertising and of circularisation of all creditors at the rate of, I think, one shilling per head.

1439. Mr. Lloyd Williams: Have you considered the possibility of the Court itself imposing a caveat without application by the Official Receiver or trustee? - Yes. The Court forms a certain view of a bankrupt during the course of examination and it might well be the Court would decide to enter the caveat itself. But of course there is a way in which things in fact work regardless of the statutes. There are means of doing it in another way. A way I envisage this machinery possibly being bypassed is simply to postpone the conclusion of the public examination until everyone has had time to think about it. I myself envisage in relation to the original scheme that, to cope with what might seem a difficult decision to make, the Court might adjourn the conclusion, which is a judicial act, until people had had time to do their figures and judge conduct; so that even though the Court has power to enter a caveat, it may decide to postpone doing so until it had itself had the opportunity of reading the transcript of the public examination. I and my colleagues do lay great stress, in a complicated bankruptcy or one fit for a caveat as a penal restriction, on an opportunity being afforded for considering the result of what might be two or three days of transcript evidence spaced out at periods of possibly several weeks. Therefore it would seem to me that the Court would possibly not think it judicial to form its own view as to a caveat simply at the moment when the questioning had ceased.

1440. Chairman: I think it would be perfectly possible for the Court in a proper case to adjourn the public examination to a suitable time while it considered the question whether it could enter caveat or not. Do you agree? - (Mr. Duveen): Yes. - (Mr. Muir Hunter): There is this point, that in any event due notice must be given to everybody. In the case of the Court exercising its powers I should consider it capable of producing injustice if the Court were simply to say at the conclusion of the public examination they proposed to enter a caveat, without the bankrupt having notice of matters which were put against him which, as I say, might cover a number of days and the bankrupt himself would not have an opportunity of re-reading the transcript until the conclusion of the examination.

1441. Mr. Lloyd Williams: Are you against the power of the Court to enter caveat on its own initiative? - No, I am not against it.

1442. Chairman: In the sort of case you are speaking of, if the bankrupt felt he was liable to be unjustly treated, he could himself appeal? - I have no doubt this has been gone into in much more detail by the Committee.

1443. Mr. Lloyd Williams: If application is made some considerable time after the closing of public examination, you think creditors should be given notice of that application so that, if they want to, they can turn up and support it; that is your idea? - Yes.

1444. Mr. Peirce: Who, in your view, ought to notify the creditors? - (Mr. Duveen): That has been provided for, has it not, by our suggestion of increasing from one shilling and sixpence to half-a-crown the stamp on the creditors' proofs?

1445. That, you think, should cover incidentals such as sending notice of application to enter a caveat? - I suspect that was only the cause on our part.

1446. It cannot be anything else? - That was the purpose of it.

1447. Chairman: Do you think there is a case for making the County Court Registrars' powers the same as those now enjoyed by the High Court Registrars? The main reasons why we thought it might be a good idea were, firstly that the judge in the County Court is likely to be busier than in the past, and secondly that the Registrar knows far more about the bankrupt than the Judge can. - One of the difficulties I have had - and I am sure Mr. Muir Hunter has had many more - is with a number of appeals from receiving orders in which the Registrar had made a receiving order because he knew the man, not on the evidence given at the hearing of the petition, but because he had known the man for a number of years in other litigation and had used all his knowledge at the hearing of the petition. My own strong view is that country Registrars - really it is the country Registrars who are the difficulty - ought not to be given any more power than they have at present. - (Mr. Muir Hunter): I agree. - (Mr. Figgis): The Registrar of the County Court knows the bankrupt possibly as a litigant in the County Court, and perhaps in his capacity as District Registrar of the High Court he may know him as well. There is power at the moment for the Lord Chancellor to give Registrars those powers, if I remember rightly.

1448. In paragraph 1 (viii) of your memorandum you express the view that there should be power to revoke automatic discharges. Have you considered the effect of that on intermediate transactions, the transactions between time of discharge and time of order? - (Mr. Muir Hunter): I do not think we have.

1449. Suppose the man gets his discharge automatically at the end of two years and he is then at liberty for a year; then the Court finds out that he has concealed assets and revokes the order of discharge. During that year at liberty he may have indulged in a hundred and one transactions with different people. - (Mr. Chandler): That is so. Quite a number of discharges have been revoked by the Court, particularly now, and in the meantime there has been another batch of creditors and the result is chaos. These new creditors cannot prove of course. Their only remedy is to take bankruptcy proceedings. Then the trustee in the first bankruptcy would prove in the second for unsatisfied balance of debt. - (Mr. Duveen): So there is nothing novel in our suggestion that the discharge can be revoked, because it can be done today.

1450. Yes, in the case where the discharge had been granted subject to conditions which are not fulfilled. But I have never heard of a case myself in which a discharge was revoked after it had become fully effective. - (Mr. Chandler): In the case I was instancing the discharge was effective but the conditions continued after the bankrupt got his discharge and the Official Receiver's report was made after he got his

discharge. - (Mr. Figgis): In your own draft Act, subsection (12) Section 26, there is provision for revocation of the discharge. That is a repetition of the existing subsection (9) Section 26.

1451. You want similar provision in any new scheme? - (Mr. Duveen): Yes.

1452. May we go on to your suggestions on monetary limits? You suggest putting up the minimum for presenting a petition to £100. - I think we are not wholly unanimous. I personally am for keeping it to £50 but I was overruled. The view I take is that bankruptcy is a very proper and convenient method of enabling creditors to get their debts paid, and the figure, in my view, ought to be kept as low as possible. The fact that the cost of living has gone up is really nothing to the point. My colleagues are without doubt against me on that point and want it to be £100.

1453. Is your reason for wanting it put up merely the change in the value of money, or is there any other reason? - (Mr. Figgis): Very largely perhaps this is for the creditor himself to decide, but the cost of the bankruptcy petition is out of all proportion to a £50 debt. It would perhaps be wrong to allow a creditor for what is really a small amount to waste in with a view to recovering the costs of his petition as a first charge, where perhaps more substantial creditors would rather take another course.

1454. Mr. Lloyd Williams: The Registrar is not obliged to make a receiving order, is he? - No but the general view held is - debt of over £50, no ability to pay, *prima facie* case. If it were intended that the petitioning creditor should have a larger debt, it is for Parliament to say so. That would be the answer, if the Registrar said you had a very small debt.

1455. Chairman: I think we are all agreed with you that the £20 maximum for tools of trade just goes nowhere nowadays. Do you think £50 is enough for it? - We did hear, subsequently to writing our memorandum, that there was an amendment proposed by, I think, the Evershed Committee in relation to executions, where it was going to be provided that the excepted sum should be the sum of X pounds or such sum as the Board of Trade may fix. I do not know if that is correct or not. - (Mr. Muir Hunter): The Evershed Committee's Final Report Section 6, paragraph 410, where they were considering the disparity between the Small Debts Act, 1845, Section 8 and the County Courts Act, which exempt from execution wearing apparel, tools and so on up to £5 and the Bankruptcy Act, drew attention to the fact that the figure in the Bankruptcy Act was £20 and proposed £20 should be fixed for the Small Debts Act and County Courts Act, but having regard to the variation in the value of money they recommended it should be £20 or such other figure as the Board of Trade should fix by regulation. I think there is a Bill embodying this recommendation before the House at the moment.

1456. Some witnesses have suggested £100. Would you think that too high? - (Mr. Duveen): In practice the figure is not adhered to at all. It is merely a notional figure. - (Mr. Muir Hunter): It all depends on what one means by tools of trade. For a man carrying on business in his own account it might comprise the whole of his factory assets.

1457. If you think of a married philoprogenitive dentist, then £100 would not go far? - There was one case involving a friendly discussion as to whether a debtor's gold teeth were wearing apparel or not. That was an actual case. - (Mr. Duveen): I do not know whether it would be possible to give power to the Court to extend the figure in any particular case. How would that work? - (Mr. Figgis): I would have thought the present system is working very well but that it is stretching the statutory limit too far. The good sense of those who have to deal with this Section has dealt with the problem very adequately so far, but they are straining the statute. Such a figure as would fit the normal case today should be substituted and those who have to deal with this matter should be left to exercise their very good discretion as they have been exercising it.

1458. You would not be unhappy if the figure were increased to £100? -

(Mr. Duveen): As this subsection says "not exceeding" I suppose there is a case for putting the figure pretty high, higher than £100 really, because, if you put it at £250 or £500, that would not entitle the bankrupt to keep the various articles up to that figure and it would make it sufficiently elastic to cover the dentist, for example, you were referring to. - (Mr. Muir Hunter): Might I make a suggestion? If this subsection is receiving close consideration and some steps being taken to bring it up to date, might it not be a desirable piece of machinery that the statement of affairs, the collection of sheets on which the bankrupt discloses his affairs, should contain some special section in which the bankrupt lays claim to the statutory articles, analogous to the wife's statutory claim to the furniture, so that it could then be decided what he was claiming and how much? Otherwise it remains very vague.

1459. The statement of affairs, if I remember rightly, is one of the forms which are part of the Rules, and the Rules are outside our purview. We are only asked to suggest amendments to the Act. - (Mr. Duveen): But the case of *Re Fletcher* says the Rules are part of the Act. - (Mr. Figgis): "Shall have effect as though enacted in the Act".

1460. It is an apparently small point. As regards the execution for a judgment exceeding £20, we are proposing to recommend a very drastic revision of the execution Section. If I might consult you about that while we are on the subject, I think you would agree the great thing to be done about the execution section is to simplify it. What we thought of recommending was briefly that the act of bankruptcy should be the seizure, and not the holding for 21 days; but notwithstanding that, if the creditor can manage to hold on to those goods 21 days without notice of petition, he can keep them, but if he gets notice of petition within 21 days he has to cough up, and a receiving order could follow. Do you think that would work? - (Mr. Figgis): Yes. - (Mr. Muir Hunter): Subject to consideration being given to the practice of walking possession.

1461. I think we contemplated walking possession counting as possession. It is unreasonable to expect a man in possession to remain physically in possession during opening hours. - (Mr. Chandler): I had a case where the Sheriff took possession of a herd of cattle and had walking possession for two months.

1462. It could not be anything but walking possession with cattle. - He had possession and he had an arrangement with the owner whereby the owner should service them and deliver the milk, and at the end of two months he sold the cattle.

1463. We shall have to consider that. You think something more than mere walking possession should take place. The man who takes possession should, where practicable, label the thing? - In the case I referred to just now, the Sheriff having been in possession for more than 21 days, when he sold two months afterwards the creditors put a petition on alleging the sale as an act of bankruptcy. I had no difficulty of course in getting the Court to dismiss the petition. - (Mr. Muir Hunter): The point was raised in the case of *Watson v Murray*, making the Sheriff liable for waste. - (Mr. Figgis): It is proposed that there should be any discretion such as that which is intended to be given by the amendment introduced by the 1947 Companies Act, which said the Court might vary the rights of the trustees. As it was provided in that Section in relation to the Bankruptcy Act it was hardly worth the paper it was written on because the trustee always said "I am not relying on my rights under the Section 40 of the Bankruptcy Act, I am relying on my title under Section 37". There was an unreported decision in the High Court that, in those circumstances, the discretion under the Section of the Companies Act did not arise.

1464. It really becomes worthless? - If it were proposed that the position should be the same as or similar to that in companies winding up, where the Court is given complete discretion, it would involve redrafting

and giving an entire discretion to the Court to set aside the rights of the execution creditor or the trustee to such an extent as it thought fit.

1465. On what principle do you suggest the Court should exercise this discretion to deal with other people's rights? - There have, I think, been two cases under the Companies Act where it was held that, if the execution creditor had been kept out of his money by promises on behalf of the company, and so had left the issuing of execution in faith of those promises till very late, that would constitute sufficient ground to permit the Court to exercise its discretion in his favour, and the fruits of the execution should not be available for the general body of creditors in the liquidation. These were *Re Grosvenor Metal Co.* (1950) Ch. 63; and *Re Suidair International Airways* (1951) Ch. 165. One never got to that position in bankruptcy because of the curious drafting of Section 115(2) of the 1947 Act.

1466. Would you like to look at our proposed redraft of Sections 40 and 41? - (Mr. Duveen): In subsection (1), if I may ask, is "levy" an appropriate word to use for attachment?

1467. We ought perhaps to put in somewhere in this Section that levy includes attachment. That would meet the case. - (Mr. Figgis): Would it, because suppose he receives the notice and the presentation of the petition after he has attached a debt? - (Mr. Duveen): That would be all right if "levy" includes attachment of a debt.

1468. Then he has 21 days before he is safe to spend the money, if he gets it. - (Mr. Muir Hunter): But the authorities as to attachment under the present Section mean you must actually have received money. It is not sufficient to get the order absolute.

1469. The wording is "from his receipt of the debt" - which literally is nonsense. You might as well talk of a man beating his marriage when you mean beating his wife. We must think this over. - The levy would be equivalent to the garnishee order nisi. - (Mr. Chandler): The levy is on the goods and they are in his custody as an officer of the Court from that moment.

1470. In the case of that debt it would not be by virtue of the Sheriff's action but by an order made by the Court. Perhaps it would be simpler after all to say after "levy" the words "or attachment". - (Mr. Muir Hunter): Is it intended that this Section should be read subject to something equivalent to the present Section which provides that the levying of an execution after notice of bankruptcy shall nevertheless be invalid? Section 40 at the moment requires that you must have completed execution before receiving notice of an act of bankruptcy. You cannot receive notice of an act of bankruptcy and then go off and levy and execute; you must complete it before you receive notice of an act of bankruptcy. But this draft would not seem to invalidate execution provided you did not receive notice of petition.

1471. I think the answer is that you have notice of an independent act of bankruptcy. What we have provided is that the Sheriff, if he plays his cards in the manner laid down in this Section, as far as he is concerned is protected anyhow. I should have drawn your attention to it. - (Mr. Figgis): It strikes me, looking at Section 40, subsection (1), that, if a creditor attaches a debt on the notice of an act of bankruptcy, attachment of the debt is not an act of bankruptcy.

1472. I have made a note for further consideration and query on the act of bankruptcy. - (Mr. Muir Hunter): I do not know whether it would be possible for me to throw an additional pebble into the pond, not on the subject of the Bar Council memorandum, and that is that the learned assistants on this Committee might apply their minds to rights of sequestration. The point has recently been argued at length before a Judge of the Divorce Division in relation to maintenance. It might be a matter just to look at. It is entirely devoid of authority at the moment.

1473. We thought of making the County Court jurisdiction £400 so that it would be level with the ordinary County Court jurisdiction at the moment. Do you think that is a good idea? - (Mr. Duveen): We thought £500 logical but I would not argue about that.
1474. We thought it might be simpler to keep it at a level of £400. I am rather surprised to see you want to leave the limit for summary administration unchanged. - We had a good deal of argument among ourselves about this. Two were in favour of increasing it but the other two were not.
1475. The general weight of the evidence seems to be in favour of taking a figure of something like £1,000. Is that too much? I understand that trustees as a whole do not very much like having to deal with cases of less than that. - (Mr. Chandler): That is so. They do not like it. - (Mr. Duveen): It depends on the Official Receivers and if they are content we are.
1476. We have not had any objection from them. - (Mr. Piggis): We were perhaps influenced in our recommendations by the fact that the discharge scheme was going to throw a great deal more work on to the Official Receiver's department, and if one were going to do that there one did not want to throw on them at the same time a great deal more of the administration and trustee work. - (Mr. Chandler): I note the text before you under Section 129 still contains the provision that the Official Receiver shall be the trustee. Is it subject to the Court's discretion? - (Mr. Duveen): I think he must automatically become trustee in a vacancy and so on. - (Mr. Muir Hunter): It is compulsory at the moment, subject to the provision of Rules.
1477. They can still appoint a private trustee by special resolution. - (Mr. Chandler): The creditors can, if they want.
1478. I think we are in agreement with you about the retention of the figure of £10 for incurring credit, but as regards the other two figures in the criminal section - £10 for fraudulent concealment of property and £20 for absconding with property, do you not think those money limits might come out altogether? - Yes, I think that is very sensible. - (Mr. Duveen): I think that is right. The gravamen of the thing is not the amount they take away.
1479. On after-acquired property, do you not think the present law where it vests automatically in the trustee is fraught with great inconvenience? Suppose the bankrupt goes out and buys a white elephant. The trustee is saddled with the job of feeding the brute. We were considering recommending that if bankrupts after-acquire property it shall not vest in the trustee unless he claims it. - I think that was the view of the profession before *Re Pascoe* (1944) Ch. 249, which came as a bit of a shock.
1480. You would be in agreement with the position being as it was thought to be before *Re Pascoe*, subject of course to a man being put under a duty to disclose his property? - (Mr. Muir Hunter): Yes. Under your present proposal I understand that would apply to the caveated bankrupt.
1481. The duty to report would, but where he does acquire a bit of after-acquired property he shall, under our proposals, Section 22, new subsection (4) -
- "... disclose to the trustee any property which may be acquired by him before his discharge."

I do not know how easy it would be to enforce that in practice? - (Mr. Chandler): When a bankrupt applies for his discharge there is a questionnaire delivered to him by the Official Receiver.

1482. He has to answer that questionnaire only if and when he applies for his discharge, but we thought there would be no difficulty in having a specific provision in the Act for him to report if at any time he acquires any property, so as to give the trustee a chance of claiming it if he wants to. - That would be very difficult. - (Mr. Duveen): I think that is absolutely right. - (Mr. Chandler): Without any limitation as to value? After-acquired property can be so small. If I may carry this a little further - supposing he is a trader who is not trading on credit at all but is trading on a cash basis. He will have a certain amount of stock which varies from week to week. Is he going to have a regular stocktaking and report accordingly? I am not trying to be awkward, merely trying to envisage what might happen.

1483. You are being very helpful. I fancy that in such a case the answer would be that he would tell the trustee, "I am carrying on business as a confectioner and tobaccoist, and my stock is changing from day to day", and any sensible trustee would say, "That is all right. Carry on." - (Mr. Duveen): Could we have a half-yearly report?

1484. You think it ought to be a half-yearly report? - We suggested on Page 6 of our memorandum that he should be compelled to make a report every three years. We had considered originally a half-yearly report, but we thought it would be objected to by the Official Receivers because it would put an enormous amount of work on them. We did come to the conclusion that a periodic report by the debtor was the more practical way of dealing with it. - (Mr. Piggis): It might be that under the scheme for discharge outlined in your memorandum you could make it that a non-created bankrupt should report to the Official Receiver, say, 18 months from the conclusion of his public examination. The non-making of such a report would be a ground upon which the Official Receiver might apply for a caveat; or, if the report which was made and investigations into it disclosed matters which made it desirable that further matters should be looked into, the Official Receiver would then be in a position to apply for a caveat. Those two things would tie up fairly well. Although we put it a great deal later in our memorandum it is what we suggested for discharges, to try and make the report tie up with making the question of discharge come automatically before the Court. There would then have been, just before the matter came to a head - if I may use a neutral term - some report for the Official Receiver which would have put him into the picture and enable him to deal with the matter as it was coming up.

1485. You think that six months before the expiry of the two years would be adequate? You do not want to make it too soon or too late, of course. - Not too soon or too late, no.

1486. Mr. Emerson: I should have thought that the number of undischarged bankrupts carrying on business in their own name would be negligible while they are still undischarged. - (Mr. Duveen): They cannot carry on business: they are not allowed to carry on in a name other than that in which they were made bankrupt.

1487. No, they carry on as manager, do they not? So the idea of this physical stocktaking every so often, I should think, could very seldom arise? - They acquire assets even if they do not carry on business. If your scheme suggested that a bankrupt had to report to the trustee every time he acquired a piece of property, then either he has got to report every time he buys a box of matches or a pipe, say, or the law is ignored.

1488. Chairman: Would you suggest that we put a monetary limit in there of some sort - reporting the acquisition of property to the value of £10, or whatever it may be? That means that if he buys a new suit of clothes he has to report it. - That would obviously meet the objection to some extent. - (Mr. Chandler): Take an ordinary trader: he is trading, and he is trading to some extent on credit probably, and if the creditors know he is an undischarged bankrupt and is trading on credit there is no need for a monetary limit. See Section 47 of the Act.

1489. Mr. Lloyd Williams: Is an undischarged bankrupt allowed to trade in his own name? If he is a manager it will not arise. -
 (Mr. Muir Hunter): In point of fact most of these gentlemen call themselves the Globe Supply Co. - something of that sort - so that the actual name would not come to the notice of the public; but if the bankrupt is buying goods on credit which he will probably sell next week, is he going to report them? - (Mr. Duveen): That is why we thought our suggestion was. I will not say a better one, but perhaps rather better than yours - that instead of making a report every time he bought anything, that there should be periodic reports every six months.
1490. Chairman: To the trustee? - To the trustee, yes. Because otherwise it occurs to me that every time he buys household goods he would have to send in a report about the milk he bought last week, or in some cases, whisky, of course.
1491. As regards the Official Receiver being trustee in non-summary cases, the position seems to be this, that he is never actually appointed trustee; what happens is that a resolution is passed by the creditors that he should continue to act as trustee, and the Board of Trade winks an eye and refrains from appointing anyone else as trustee. Do you think it would be desirable to take out the words "... shall appoint a trustee" and put in "... may appoint a trustee"? - Perfectly satisfactory. Our view of the law in paragraph 5(4) is quite wrong, I think. Section 19(5) specifically provides for that. I think the present position is that he cannot be appointed.
1492. No, but what I think would regularise the position would be to make the appointment of someone else permissive and not obligatory. -
 (Mr. Chandler): There is one case I know of where the Official Receiver was appointed as trustee in a non-summary case - I have given a note of it - and he was required to give security, just the same as any trustee. That is only one case.
1493. And that was a slip-up? - No, it was not a slip-up. It could not be a slip because the Board of Trade, as you know, go into the question of the security, and they decided that in those circumstances the trustees would have to give security just the same as an outside trustee.
1494. Was it a composition case? - No.
1495. I wonder if you would glance at our new proposal for Section 69, dealing with what happens to the title and that sort of thing if the debtor pays in full. The reference is opposite page 48. If you would kindly run your eyes down it and let us have your views, that would be the quickest way of dealing with it. - (Mr. Duveen): The effect of this proposed amendment is that on the payment of the debts in full there should be a compulsory annulment of the adjudication order?
1496. That is the idea. - At the present moment it is discretionary, is it not?
1497. Yes. We felt that on this occasion ethics must give way to expediency, and the man is more likely to pay his debts in full if he is certain that he is going to get his bankruptcy annulled than if he felt that even if he paid in full, the Registrar would say, "I will not annul the bankruptcy." - I would say that I entirely agree with you, because there is this problem. The other day there was a case of a man who went bankrupt some years ago, not for a large sum, incidentally. Since then he has made good, and would have been prepared to pay in full and have his bankruptcy annulled, except that it would have involved advertising and an application to the Court, and consequently he is sitting there, a very rich man, refusing to pay his debts.
1498. It may be the same case we were thinking of, or another like it. -
 That is a rather tedious way of saying I entirely agree with you. I think it is right.

499. I fancy this provision will work all right? - (Mr. Chandler): I think it will work very well. - (Mr. Muir Hunter): There is a suggestion that this privilege ought not to be awarded to very bad cases. Supposing that if Mr. Sidney Stanley came to this country with whatever it was - £50,000 - which he succeeded in borrowing, he could get an annulment; although I suppose he is one of the worst bankrupts we have ever had. This Section does not envisage that the privilege should be enjoyed only by people who have earned the money. I can imagine that Captain Peter Baker, who is a bankrupt who has lost his seat in the House of Commons, could theoretically get his father to put up another £100,000, and buy himself back into public life.

1500. It might be that we ought to put something specific in to this effect - "but shall not affect any liability to prosecution." These very bad people who come along with pots of money and pay their debts in full ought not to be immune from prosecution by reason of the fact that they get a compulsory annulment. Do you think we ought to put something specific in, making it clear that an annulment does not affect criminal liability? - I think that is an important point. I regard this matter as one of very high principle - as to whether a man should be able to get away with what in 1869 was called "white-washing", where he or his friends could simply buy him out. It may be very much to the interest of the creditors that if you can get enough money there is no nonsense about the discharge - you simply pay 20/- in the £, and that is the end of it until next time.

1501. Mr. Peirce: I suppose he is entitled to obtain the wherewithal for payment from some source. - (Mr. Duveen): It seems to me we are considering two things: one has this disadvantage of letting a bankrupt get away with it, from a bankruptcy angle, and the other is to encourage the bankrupt to pay 20/- in the £. I think really I am saying what you were saying, that if you can get the creditors 20/- in the £ it is in their interests.

1502. Mr. Lloyd Williams: But even if the bankrupt does pay 20/- in the £, he can still be prosecuted? - Mr. Muir Hunter was putting it from the high ethical point of view that a bankrupt ought not to get away with it. - (Mr. Muir Hunter): There is actually a long line of authority on this point which I was merely echoing. - (Mr. Chandler): I have been approached by two individuals - not giving their names - they are both millionaires and neither name was disclosed, and I was asked to advise them as to publicity. One said, "Well, I cannot risk it. My position where I am is so complicated with my commercial friends that it is impossible for me to risk being advertised as having been declared bankrupt some years ago. You cannot guarantee that I shall be granted an annulment. I want to pay in full: I will pay interest over 25 years". He asked, through the solicitor, "Can you guarantee that I shall get this annulment?". I said no, I could not guarantee it.

1503. Chairman: It seems to me - I am not speaking for my colleagues - that case particularly illustrates the desirability of using the word "shall" and not "may". - (Mr. Duveen): It is not intended, is it, to publicise or gazette the annulment?

1504. As the Rule stands at present the annulment has got to be gazetted, but we could put in a recommendation that the Rule should be altered. - I would have thought that was really the basis of the whole thing. If it is still to be gazetted there is not much point in it.

1505. Who reads the "London Gazette"? - Well, debtors are afraid. I must say I always read the bankruptcy notices in "The Times".

1506. Mr. Lloyd Williams: Of course, we cannot deal with it ourselves - it is not our province. We can only recommend that the Rule should be altered. - Yes, but the point of the subsection has really gone if the annulment has to be gazetted.

1507. Chairman: What is to happen if the man pays 20/- in the £ and costs and everything, and then his bankruptcy is not annulled? What happens to his property? - (Mr. Chandler): He applies for his discharge.

1508. If he is such a bad hat, presumably the Court refuses to discharge him, too? - (Mr. Muir Hunter): That is not the line of authority, if I may say so. In the later cases where that happens the Court has intimated that it will entertain either an immediate or a very early grant of a discharge. Where a man pays his debts not out of his assets or out of what he has earned but out of his rich father, he has not really acquired any merit in the eyes of the Court.

1509. But it is an empty shell of a bankruptcy and there seems to be no point in perpetuating it. - (Mr. Duveen): Exactly. -
(Mr. Muir Hunter): I will make one further short point. If it is not intended that the annulment should be gazetted, it might give rise to the position where somebody describes somebody else as a pestilential bankrupt. The chap says, "That is defamatory. I am not a bankrupt."

1510. Well, gentlemen, we usually finish at six, but we have not finished. Do you think you can possibly come here at another time, probably not this side of the Long Vacation? Do you think you could possibly attend again, and is it difficult to arrange a time which is convenient to all four of you? - (Mr. Duveen): We can arrange it, I think.

1511. If we could get it in before the Long Vacation it would be better for everybody. - Yes, I am sure we can do it. You fix a time that suits you.

(The witnesses withdrew)

Monday, 16th July, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EDMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

LETTER AND MEMORANDUM SUBMITTED BY
THE BRITISH BANKERS ASSOCIATION

Post Office Court,
10, Lombard Street,
London, E.C. 3.

3rd February, 1956.

B. MacTavish, Esq.,
Joint Secretary,
Bankruptcy Laws Amendment Committee.

Dear Sir,

Bankruptcy Law Amendment Committee

I write to inform you that the contents of your letter of the 2nd November have now been fully considered and I have pleasure in submitting to your Committee the enclosed Minute of Evidence.

I may say that the Minute, though compiled by the Clearing Banks, is submitted on behalf of all the member Banks of the British Bankers' Association. No objection would be raised to the evidence being published in due course.

The Banks will be pleased to give oral evidence before the Committee if asked to do so.

Yours faithfully,

(Sgd.) R.H. BARKSHIRE
Secretary.

BANKRUPTCY LAW AMENDMENT COMMITTEE

In response to the invitation of the Committee, conveyed by letter dated the 2nd November, 1955, to submit their views generally on the questions involved in the Committee's terms of reference and on the particular matters set out in such letter, the Clearing Banks have pleasure in submitting their views as follows:-

Broadly the experience of Clearing Banks is that the administration of bankrupts' assets has been satisfactory. Such difficulties and inconveniences as Clearing Banks have experienced are in the field of the operation of accounts of and transactions with potential bankrupts after an act of bankruptcy has been committed; on this subject, some comments are offered hereinafter under the heading "General Matters".

First, however, dealing with the specific matters raised in paragraph 3 of the letter upon which evidence is particularly desired:-

1. Clearing Banks will welcome proposals designed to limit the number of undischarged bankrupts. As it is, a number of accounts of undischarged bankrupts have to be reported under Section 47 (2) of the Act of 1914 to the Trustee in Bankruptcy or to the Board of Trade, such accounts having been opened without knowledge of the fact that the accountholder is an undischarged bankrupt. Where the bankruptcy is attributable to misfortune, the earlier the bankrupt obtains his discharge, subject to proper regard to the interests of the creditors, the better, and the same applies where all available assets have been gathered and the prospect of any further substantial accretions from the bankrupt's future activities is remote. Upon the other hand, if the debtor's conduct has been reckless or has verged on the fraudulent, particularly if the debtor had a business, he is not entitled to leniency and Clearing Banks assume that the Committee will be satisfied before recommending the scheme submitted that, in all appropriate cases, the scheme will ensure that a caveat will be entered against the automatic discharge of the bankrupt on the expiry of the two year period.
2. This is a difficult question upon which opinion may well be divided but, on the whole, Clearing Banks would support the suggestion that, in respect of assets acquired by the bankrupt after a previous bankruptcy, creditors in the second or subsequent bankruptcy as the case may be should have priority. On occasion such assets must, for example, be the product of a bank advance and those creditors, who have in effect created the assets, ought not to be deprived of them for the benefit of a class of creditors who have not contributed to their creation. While it is true that a bankrupt's status is always ascertainable by search unless a fictitious name is being used, and the public, including traders and the Banks, deal with such persons at their risk, in practice, the fact that there is an unsatisfied bankruptcy is, more often than not, unknown.
3. Clearing Banks would agree that the depreciation in value of the purchasing power of money since the Act of 1914, should be recognised by a suitable increase in the monetary limits prescribed by the Bankruptcy Acts, possibly, however, with the exception of the minimum debt on which a bankruptcy petition can be founded. It is always distasteful to Clearing Banks to have recourse to what they regard as the extreme course of presenting a bankruptcy petition, and they only do so when the circumstances virtually leave them no alternative, that is to say, when a debtor who they are satisfied is capable of making at least some contribution towards his obligations deliberately disregards them, or where fraud or other improper conduct deprives the debtor of any right to sympathy.

4. Clearing Banks consider that before any suggestion is made for changing the existing provisions in respect of the vesting of after-acquired property the matter should be weighed very carefully. The present law, although complex, is comparatively well understood and does not involve the Banks in difficulty.

5. The general experience of Clearing Banks is that they and other creditors have been well served by the competent professional accountants who normally act as the Trustee in non-summary cases. Clearing Banks have no evidence suggesting any widespread need for creditors being afforded a right to appoint the Official Receiver in non-summary cases.

6. This matter is presumably primarily one of convenience in the legal procedure to be followed, and Clearing Banks express no opinion.

7. Clearing Banks would welcome the enlargement of the provisions of Section 51 of the 1914 Act to cover all kinds of earnings, including wages of workmen. In these days, it is felt that, logically, no distinction should be drawn between salaries and wages; further Clearing Banks have never understood why the earnings of professional men who suffer the misfortune of bankruptcy should not be brought within the ambit of the provisions of the section.

8. Clearing Banks do not consider that they are able to offer any helpful comment under this heading beyond stating that anything that can be done to ensure that prosecutions are instituted in all appropriate cases and conducted expeditiously would, in their view, be in the public interest.

9. Again, Clearing Banks have no special experience upon which to found any useful comment under this heading. If however, control by the Board of Trade over the administration of assets vested in a Trustee under a Deed of Arrangement is considered inadequate, it is desirable that such control should be made more effective.

General Matters

Section 1 (1) (h) Bankruptcy Act 1914

With one exception the definitions of acts of bankruptcy in Section 1 present little difficulty to persons dealing with a potential bankrupt who have to arrive at a conclusion as to whether an act of bankruptcy has or has not been committed. The exception is paragraph (h):-

"If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

Although suspension of payment has for a very long time been an act of bankruptcy nevertheless time has not tempered the doubts and differences of opinion as to what amounts to a notice of suspension of payment. Notwithstanding the guidance to be derived from the decided cases, those engaged in commerce who have to decide the question, are faced with the greatest difficulty in reaching an unassailable conclusion. This uncertainty is embarrassing to the Banks as well as to the commercial community. The consequences of forming an erroneous view on any particular set of facts may be serious owing to the doctrine of relation back.

Section 11 Bankruptcy Act 1914

Under Section 11 of the Act of 1914 notice of every Receiving Order must be gazetted and advertised in a local paper in the prescribed manner. Nevertheless the Court has power on the application of the debtor to stay such advertisement. The Receiving Order, however, is in fact made so that the protection afforded by Sections 45 and 46 does not operate.

It is believed that the Official Receivers in such cases endeavour to notify any Bank holding an account of the debtor concerned of the making of the Receiving Order and of the stay of advertisement. This practice was established as a result of the representations made to the Board of Trade by the British Bankers Association after the decision in the Wiggall case (1921 2 K.B. 835) when the Board of Trade, whilst resisting any amendment to the law gave the following undertaking:-

"So far as possible steps would be taken to prevent a stay of the advertisement of a Receiving Order except in cases where the debtor had revealed the name of his bankers in order that they might be advised of the stay".

Nevertheless cases have occurred where such notification has not been received.

Whilst appreciating the possible necessity in exceptional cases for the exercise of this power any notification given to the Banks must depend upon the ability of the Official Receiver to ascertain the debtor's banking account. There may be accounts at more than one bank.

Having regard to the financial loss to the business community that can follow upon such a stay there would seem to be grounds for abolition of the power or at any rate strict limitation as to its exercise.

Some alleviation to the inequity of the position was afforded by Section 4 of the Bankruptcy (Amendment) Act 1926 both to the Banks and others transacting business with a debtor up to the time of the advertisement of the Receiving Order; but the protection so afforded is by no means complete and might be enlarged.

Deeds of Arrangement

The entering into a Deed of Arrangement by a debtor is an act of bankruptcy and should a petition be presented against the debtor within a period of three months from the date of the Deed and he be subsequently adjudicated bankrupt the Deed of Arrangement is avoided and the bankruptcy will relate back to the date of such Deed.

Clearing Banks are frequently asked to open accounts in the name of a Trustee under a Deed of Arrangement into which payments are made derived from a variety of sources such as the cash in the debtor's till at the date when the Trustee takes over, the proceeds of sale of the debtor's property, the book debts due to the debtor which are collected and negotiable instruments drawn in favour of the debtor.

Since under Section 11 (4) of the Act a Trustee of such a Deed is in duty bound to pay all moneys received by him into a banking account it has always been assumed, although there is no specific authority on the point, that the receipt of such moneys by a Bank from the sale of the bankrupt's property or by the collection of negotiable instruments could not be questioned in a subsequent bankruptcy.

However, the position appears to be entirely otherwise when the Bank has allowed the Trustee of a Deed to draw moneys out of the account.

Prima facie all moneys paid into the bank account will form part of the debtor's estate should he be subsequently adjudicated bankrupt within a period of three months (reducible in certain circumstances) and as the Bank holding the account has notice of an available act of bankruptcy the Trustee in Bankruptcy could avoid all payments out and recover sums from the Bank. Clearing Banks see no reason to doubt that this is the position, Section 45 being inapplicable in the circumstances, and so far as Section 46 is concerned cheques drawn by the Trustee under the Deed in favour of third parties being neither payments to the person subsequently adjudged bankrupt or to a person claiming by assignment from him. Were it not therefore for the fact that the Banks in the public interest have

accepted the risk and allowed Trustees of Deeds of Arrangement to operate bank accounts, including where necessary, the drawing of cheques, no estate administered by a Trustee under a Deed of Arrangement could be carried on. If credits only were accepted for such accounts the effect would be to sterilize them with the result that the Trustee of a debtor who carried on a trade or business might find it entirely impracticable to carry on such trade so that the object of the creditors entering into the Deed of Arrangement would be defeated. In view of the risks involved there have been instances where banks have refused to open an account in the name of a Trustee under a Deed of Arrangement. It must not be overlooked that where a business is involved the turnover on the account may be substantial.

Although Clearing Banks are unable to instance loss sustained by the Banks by reason of the lack of protection afforded the risk exists, substantial sums may be involved and they consider the matter needs attention.

Should further evidence be desired from Clearing Banks, possibly in connection with proposals received by the Committee for amendment of sections of the Acts with which the Banks are closely concerned in practice, Clearing Banks will be pleased to submit an additional memorandum.

EXAMINATION OF WITNESSES

Mr. Francis Cecil Leonard Bell, D.S.O., M.C.	} Representing the British Bankers' Association
Mr. Laurence Percival Galpin	
Mr. Robert Marwood	

Called and examined

1575. Chairman: Gentlemen, I do not know if you have had a recent document we circulated, headed BLA/112, containing a modified scheme dealing with discharge? - (Mr. Galpin): Yes, Sir.
1576. Do you think that modified scheme is an improvement on the one originally suggested, or not? - Yes, we think so, with a reservation or two, if I may?
1577. Yes, certainly. - As regards existing bankrupts, is a creditor to have some opportunity to do something straight away, to object?
1578. What we thought was that any application to the Court should come from the Official Receiver, but of course there is nothing to prevent the creditor joggling the Official Receiver's elbow and drawing his attention to anything he wants to. - But nothing stronger than that?
1579. We did not think that it would be advisable to have the Courts flooded with applications. - Then may I ask what happens with regard to future bankrupts under B of the modified scheme: "Application may be made for a caveat either at the conclusion of the Public Examination or (by the Official Receiver or trustee) within two years"? A creditor then can object?
1580. He can do it through the trustee or the Official Receiver, but again we wanted to avoid applications for a caveat after the public examination coming from individual, and possibly vindictive, creditors. - I think I am right in saying that your original scheme did give power to these creditors?
1581. I think it did. The creditor has still got power at the conclusion of the public examination. - That is for future bankruptcies?

1582. Yes. - Is he not to have power as regards existing bankruptcies, say for three months after the bill becomes law, to object?
1583. We had not envisaged that. Do you think that would be desirable? - We thought so.
1584. Then we will consider that. - As bankers we might conceivably wish to object.
1585. Mr. Lloyd Williams: Would it not be better to get in touch with the Official Receiver who is dealing with that particular matter? - It might, yes.
1586. You would do that in practice, would you not? - Yes, but supposing the Official Receiver said "No"?
1587. Chairman: If you really wanted to take it up seriously, of course, you could give him an indemnity and use his name. - We rather like the original scheme which gave power to a creditor to object, and it seems to have been omitted from the revised scheme.
1588. We will consider your suggestion that in existing bankruptcies the creditor should have power within say three months from the passing of the Act to make the application himself. - Yes, and in future bankruptcies he should also have power.
1589. During the two years? - (Mr. Marwood): Within a similar period, I should say. - (Mr. Galpin): We would not press for two years. I imagine the idea of the two year period is in case during the examination something turns out which was not foreseen at the time of the public examination?
1590. It is not during the examination but during the two year period; some nigger might emerge from the woodpile who had not emerged at the public examination. - Exactly, but as far as a bank was concerned it would normally be able to make up its mind say in three months.
1591. Then we might make it three months in each case? - Yes.
1592. I am much obliged for the suggestion. - Apart from that we have nothing more to say about this point.
1593. I think we are in agreement about second and subsequent bankruptcies, so I need not trouble you with anything about that. - You are now talking about our written memorandum?
1594. I am looking at your written memorandum at the moment. That brings us to monetary limits, and we note with interest that you are not in favour of increasing the minimum petitioning creditor's debt from £50. We are in agreement with you about that. What views have you, if any, as to the ceiling for summary cases? It is £300 at the moment; we think that is a bit too low. - We really were not very concerned about that, I think.
1595. No, I suppose you are not, really. Most people seem to think that the round sum of £1,000 would be about right, I do not know if you have any view about that? - We would have no views one way or the other.
1596. I do not know if there are any other monetary limits that you are particularly interested in as bankers, are there? - Those were the two. I think you may take it that we have no further comments on the monetary limits.
1597. Then again as regards after acquired property, unless the law were altered very drastically indeed it would not particularly interest you as bankers, would it? - No. The present arrangement works quite well

in practice. We are used to it and there are no particular difficulties, especially as you have the intention of possibly cutting down the number of undischarged bankrupts.

1598. As regards the Official Receiver acting as trustee in non-summary cases, as you probably know he cannot actually be appointed trustee. What is done very often is that the creditors resolve to elect no trustee other than the Official Receiver, and the Board of Trade leaves him in the saddle. It is not strictly in accordance with the Act as it stands, which says that the Board of Trade shall appoint a fit person. To regularise the position we thought of putting "may" instead of "shall"; do you see any objection to that? - No, we have no objection to that small alteration.

1599. I think the only question I wanted to ask you about the next matter which you deal with is this: if the debts are paid in full, do you think it should be permissive for the Court to annul the adjudication, or obligatory? It is permissive at the moment. - This is a point upon which we were not very clear, I think, originally. I think I would rather like to stand by what we have already said, that we express no opinion on this, unless you feel that is not very helpful.

1600. It is for you to say. It is not a matter that affects you very vitally one way or the other? - No, and perhaps we may leave it like that.

1601. Mr. Lloyd Williams: But if you get your money in full, you do not mind what happens, do you? - No, definitely.

1602. Chairman: I see you say you do not understand why the earnings of professional men who go bankrupt should not be brought within Section 51, but do you see any way out of the difficulty that arises where a professional man's income is uncertain and fluctuating from day to day? - Can he not be made to contribute a minimum sum, with an increase over that sum when possible?

1603. I suppose he could, yes. - Or a sum perhaps based upon his earnings over a certain period. But he might well then have spent the money before you could determine what he should have paid over.

1604. We saw no possible way of getting the money in the case, we will say, of a doctor or a barrister, except by an order against him. You cannot foretell who his patients or his clients will be in the future. - No, he has not got a fixed income.

1605. He has not got a fixed income, nor a fixed clientele either. - No, but there is a presumption that he will earn over the next few months, so much a month perhaps, out of which a minimum sum could be paid.

1606. I do not think more than that could be done under the Section? - No.

1607. Mr. Lloyd Williams: Would it be proper to make a definite order on a presumption? - I think it depends upon the circumstances.

1608. If an order is made it is intended to be fulfilled. - Of course, and it follows that if it is not fulfilled there is a penalty.

1609. That is the point, you see. I do not think the Court is likely to make an order unless in fact the debtor is going to earn, and if his earnings are doubtful, or if there is a presumption that he is going to earn a certain sum but no certainty, I do not think it would be fair for the Court to make an order, would it? - I should have thought it would have been better to make an order if possible. We had a case, I remember, of a dentist who went bankrupt, and he I am pretty certain was made by the Official Receiver to pay out of his earnings over a period a part of what he earned monthly.

1610. That would be a consent order? - I am afraid I do not know the technical term.

1611. He voluntarily offered a certain sum, I expect. That is rather a different thing from a Court order compelling him to pay. - Is that so? Then is it not possible to persuade these gentlemen to agree to consent orders rather more vigorously than has been done in the past, perhaps?
1612. They do in practice, but the Court does not make an order in those circumstances. - Then I think all we need say is that we would like the maximum possible done.
1613. Chairman: You are not very much interested in the question of criminal prosecutions, are you? - No.
1614. As regards deeds of arrangement, we had one very novel suggestion made to us, on which I should be very grateful for your views, and it is this: if the creditors under a deed think that the debtor has been guilty of misconduct either before or after the execution of the deed, there should be power for the trustee under the deed to apply to the Court to have the estate administered in bankruptcy. - I think we should be in favour of that. - (Mr. Bell): Administered in bankruptcy, not an adjudication or anything like that?
1615. It would be effective for all purposes. - (Mr. Galpin): Full bankruptcy proceedings, a deed being an act of bankruptcy?
1616. No. The application might be long after three months from the deed. - Now we come up against difficulties there, of course. - (Mr. Bell): We have in fact raised that point in one of our paragraphs later on. I think this question rather has a bearing upon our answer there.
1617. Yes. Can we discuss the two things at once? You would like to dispose of the two questions on deeds of arrangement at this stage, would you, while we are on the subject? - (Mr. Galpin): Yes.
1618. I see on page 4 of your memorandum you speak of the difficulty about a debtor's estate should he be adjudicated bankrupt within a period of three months. But of course it might in practice be much longer than the three months, might it not? You might get a petition within the three months, and, say, three adjournments of the petition, and it might go on for the best part of a year quite easily. The point you are really making there is that the trustee under a deed has got to open a banking account with some banker, and there should be adequate protection for that banker? - If he wants to use the account other than purely as a collection account.
1619. In many cases he will want to, because he wants to pay wages, and so on? - Exactly. That is where our difficulty may come in.
1620. We have tried to get over it by drafting a Section in this form: "No banker who shall permit a trustee under a deed of arrangement to open or to operate an account as required by subsection (1) of section thirteen of this Act" - that is a slight alteration in numbering in the re-draft - "shall be concerned to enquire as to the propriety of any operation on the said account or liable to the trustee in any subsequent bankruptcy of the debtor for a sum in excess of that standing to the credit of such account at the time when such banker receives notice of the receiving order". - Yes, I think I see no objection to that. - (Mr. Marwood): That seems all right, yes. - (Mr. Bell): It sounds all right, but I should not like to commit myself. - (Mr. Galpin): I would like to make here a reservation which I intended to make when I sat down. What we say now is subject to our having a look at the bill in due course, and perhaps making some further suggestions. I hardly think it is fair, if I may say so with respect, for you to read a Section and for us to be absolutely definite about it. It sounds all right.

1621. Would you like to have a look now at the Section in draft? - Yes, but we do not want to commit ourselves irrevocably to anything like this at this stage. (Draft shown to witnesses). I think the draft Section really means that when we receive notice of a receiving order we look at the account, and if it has £57. Os. 4d. in it we are liable to pay no more than that, and in the event of the account being overdrawn.....?
1622. I do not know what happens. - We thought perhaps you might have some question to ask us later on about borrowing by trustees. Perhaps we can leave that point until we come to that question?
1623. Yes. - But if we are going to be asked, as I think we are, to allow a trustee to borrow, in particular to pay wages, I think that was the suggestion, we might conceivably have an overdraft at that stage.
1624. I suppose it is clear, is it not, that if you allow a trustee, either under a deed or in bankruptcy, to borrow for any purpose you have got his personal liability? - Yes, we would expect to have that. - (Mr. Bell): There is just one minor point here, on the drafting of the Section. It does not in fact provide for cheques in course of collection, unrepresented cheques. - (Mr. Marwood): They might have to go back, in the event of bankruptcy.
1625. You are talking of cheques drawn by the trustee and not yet presented? - (Mr. Bell): Yes. - (Mr. Galpin): That, and also the fact that something might have been paid into the account which was not at the time cleared. - (Mr. Bell): Cheques in course of collection; we should send them on to another banker and they might be returned unpaid to us. - (Mr. Galpin): The balance of £57. Os. 4d. I mentioned just now might have been comprised of a cheque paid in the day before, which had not yet been turned into cash, and it might never be turned into cash. It would be the cleared balance for which we should have to account. Any cheques presented thereafter would be referred to the trustee or the Official Receiver.
1626. "In excess of the cleared balance", would that do? - Yes.
1627. Would the word "actual" suit you as well as "cleared"? I fancy it would be generally more understood by the world outside banking circles. - Cleared of course is what we know; a cleared balance is something you can safely pay away without any fear of repercussions. A balance standing in the account could not necessarily be safely paid away, because it might comprise uncleared items and a cheque might bounce.
1628. Mr. Lloyd Williams: Would not the word "actual" cover that? - I would rather have "cleared".
1629. Chairman: Why not have them both, "the actual or cleared balance"? - (Mr. Marwood): That is better, yes.
1630. Mr. Sherwell: Then we are assuming, are we not, that the actual balance is different from the cleared? - (Chairman): By using the word "or" I intended to convey the meaning that they were two different names for the same thing. - (Mr. Sherwell): This is a purely technical question, of course. When you get a cheque, you credit it immediately? - (Mr. Galpin): Yes, if it was returned the account would be debited to adjust the balance to what it should be. "Effective" would be as good a word as any if you do not like "cleared", but I would rather have "cleared".
1631. Mr. Lloyd Williams: What is the position now when you get a receiving order? - We take stock of the position, and we would tell the Official Receiver exactly what it was, e.g. that "The balance on our account as shown by our books at the particular time is £57. Os. 4d., but that comprises £30 of uncleared cheques".

1632. What happens then? - Either the uncleared cheques get paid and we can pay over the £57. 0s. 4d., or we can debit any cheque which may be dishonoured, and give him the balance.
1633. And he is quite happy with that? - I should say normally he would be satisfied, because after all the larger balance is fictitious.
1634. But he does not ask you to pay over the larger balance until you have cleared the cheques? - In practice, no, he would not. It happens fairly quickly, of course, except in the case of a foreign collection or something like that, which we normally would not credit if the customer were likely to go bankrupt shortly, I think. I think a lot of laymen understand "cleared" these days.
1635. Chairman: We will consider the wording of that Section. I quite see your point about it. - It must be definite, please.
1636. Could we go back now to the suggestion about misconduct by an arranging debtor? The position as we see it at the moment is that the effect of an order made on the trustee's application would be much the same as an order of adjudication made at that time on the debtor's own petition. The period of relation back might or might not extend to a date earlier than the execution of the deed. - In the one case, if it extended to a date later than the execution of a deed, we should be fully protected.
1637. One of the advantages that creditors would get in that case would be that the trustee in the bankruptcy could, for example, privately examine people under Section 25, which he could not do under the deed. - I think perhaps the safest thing for us to say is that we would like to consider this.
1638. May we take it that you are not in principle against the idea? - Provided we are sufficiently protected, we are definitely in favour, but I think we would rather like an opportunity to examine it.
1639. Certainly, and if on considering the matter you see any snags from the bank's point of view, perhaps you would advise the Secretary? - Yes.
1640. Perhaps we might now hark back to bankruptcy, and consider what you say about Section 11, which has to be considered in connection with Section 45. That is all that business which arose out of the Wiggall case, and which resulted in Section 4 of the 1926 Act. It has been occurring to us that possibly a very simple method of meeting the difficulty might be to alter the wording of Section 45, proviso (i) so as to make it the actual time of making the receiving order, and not the date of making it. - Two-thirty in the afternoon of a certain day?
1641. Yes, we thought of putting that in because I was in a case shortly before the War in which a man paid some money into his bank when the bank opened at ten o'clock, and the receiving order was made at eleven o'clock. - Your suggestion would do away with the difficulty which arises from the fact that a receiving order is deemed to commence from the first moment of the day whose date it bears.
1642. Being a judicial act, it dates from midnight. - Yes, and in respect of anything we may do after 00.00 hours on that day we are sunk. This would improve matters but is it practical?
1643. I think so. - You actually sign an order at a certain time?
1644. The High Court at all events always notes the time when it makes a receiving order. - Actually to a minute or so?
1645. Yes. - Fine. I have often thought it might be done. I am very glad if that is the idea.

1646. Could we improve on it a bit further, do you think, by providing that instead of the actual time of the making of the receiving order it should be before the gazettement of the receiving order, and without notice thereof? - Yes.

1647. It seemed to me possibly that if those words were introduced you would not need Section 4 of the 1926 Act at all? - No. -

(Mr. Bell): It would be most helpful. - (Mr. Galpin): It is a most helpful and practical suggestion, if I may say so.

1648. I am not suggesting that is the only way, from the drafting point of view, which it could be done, but I think something of that sort would help matters? - Thank you, you evidently appreciate our difficulties. We would welcome something like that.

1649. There was one other matter on which I wanted to have the benefit of your views. I expect you remember the notorious Conley case, do you? - Yes.

1650. That of course has been cleared up to a certain extent, but are you satisfied with the position as it is at the moment? What struck us as being rather unfair still about the position of bankers is that, if the surety has disappeared or become insolvent, the loss falls on the innocent bank. - Quite.

1651. We thought of restoring the law as Mr. Justice Eve thought it was, rather than as Mr. Justice Clauson thought it was; that is to say, if the object is to prefer a surety, the trustee has got to shoot at the surety direct. We thought if a provision to that effect were inserted, the last of the wounds caused by the wretched Mr. Conley would be healed. - Yes, we would welcome something on those lines.

1652. The other matter which we had in mind in connection with so-called fraudulent preference is this: we had under consideration the idea of making a payment made by the bankrupt during the last three weeks voidable if it in fact prefers a creditor, whatever the bankrupt's intention was. Some protection for bankers would obviously have to be provided. - We were not clear about that point, from Mr. MacTavish's note. We saw the suggestion, of course, but we were naturally concerned to know whether there was to be protection for us, because that protection we regard as absolutely essential.

1653. We thought of providing that nothing in the Section applied to payments, whenever made, of the reasonable price of current necessities or for a present or future consideration. Concerning the position of bankers, it seemed to us that that did give you adequate protection. First of all, if the account is in credit, then the banker is not a creditor and no question of preferring the banker can arise. - Then if a cheque is drawn which does in fact prefer a creditor, and we pay that cheque - are we protected, if the transaction is void?

1654. I do not know that you are at the moment. You certainly should be. - If you are going to make void a payment which does in fact prefer a creditor, although there is no intention, and that payment is made by a cheque drawn on an account which is in credit, and we pay it, are we protected? In other words, do we pay over the balance which we find in our books, or do we have to pay over the balance plus the amount which was paid away to the preferred creditor?

1655. In the case which you are putting, what the bankrupt does is during the last three weeks to make a payment to Mr. William Smith, and he does it by cheque. The person who is in fact preferred is William Smith. The bank is neither worse nor better off than it was before the transaction. - Except that we have, shall we say, £10 less money to pay over to the Official Receiver than we should otherwise have had. We do not want to find that because that transaction was void we have got to

reconstitute the account and pay over to the Official Receiver £10 paid to William Smith which you are in fact going to get from Smith and should not have from us.

1656. Yes. We must look at the Section again, perhaps, and make quite certain that that is so. That is the intention. - Then the intention is good, and we would welcome it.

1657. Mr. Lloyd Williams: I do not think it would ever arise if the account was in credit? - It ought not to, but it rather depends upon the way you word the Section, does it not?

1658. Chairman: Supposing it is payment by the debtor into his bank during the last three weeks, first of all if the account is in credit. - The Official Receiver gets the money.

1659. And as the bank is not a creditor there is no question of recovering the money over again from the bank. If the account is in debit the bank either has adequate direct security, in which case the bank is not in fact preferred, or it has adequate indirect security, collateral security, that is, and then the trustee has got to shoot at the surety and not at the bank. If the banker has got inadequate security or none, then it means he has departed from the ordinary and prudent course of banking and does not deserve any particular protection, I think. - No, I cannot accept that. We are not philanthropists, of course, but we do what we call "nurse" a lot of deserving cases, and some recover and some die on our hands into the bankruptcy courts. We may, on occasion, in doing that sort of business with a man who has an overdraft, put the screw on very definitely and say: "This overdraft has got to come down", and we would not like to find that, having put the screw on and having got the advance down, something happened during this period of 21 days which rendered it null and void.

1660. Your point is that if this 21 day idea in anything like its present form took effect it would mean that no matter how hard the bank was pressing for the overdraft to be reduced, if in fact the bankrupt did reduce it in the last three weeks you would have to cough up the amount by which it was reduced? - Yes, and that I fear at the moment would apply even if during that three weeks we had increased the overdraft to enable him to pay his wages this week, in the hope, the expectation, on the condition if you like, that it would be repaid out of takings over the weekend; in other words, we could be running a normal overdraft at £10, we put it up to £20, and it is reduced to £10 again. That would be all right, would it not?

1661. Do you consider that the bank ought to be encouraged to nurse lame ducks by advancing money to pay wages? - Are you now dealing specifically with an advance to pay wages?

1662. No, I was trying to generalise, but let us concentrate on that if you like. - It is very difficult to define the lame duck, of course, but we always have on our books a certain number of people who are borderline cases, who want a little more money, and it is a question of whether it will do them any good if they have it. Sometimes we have to put the screw on and say "No", sometimes we take the view that a little latitude may help them to turn the corner. It may sometimes be a question of seasonal accommodation, which ought to be self-liquidating but proves not to be: farmers, and people who make a living shall we say at the seaside, and depend upon a fine bank holiday weekend, or something of that sort, may need a little assistance before the event, in the hope that after the event everything will be all right, but you get a wet weekend and they cannot put the matter right. That is what I mean by nursing lame ducks. It is, I think, perfectly valid, and I may say we do not encourage people to be extravagant on borrowed money or anything of that sort; it is part of our business to help if we can; and it is their business which is at stake.

1663. I was thinking rather of the case where the man is trading, knowing himself to be insolvent, and getting assistance from a third party, not necessarily a banker, to enable him to do that. It seems to us that the person who assists him in doing that does not deserve any great sympathy, but a bank I presume would not assist a man if it knew that the man was on the rocks. The lame ducks are not insolvent, I understand, but do require to borrow money from time to time? - Yes. They may not necessarily be insolvent, but they may be so close to it that, say, one of their own debtors failing may just turn the scale against them.

1664. Mr. Peirce: You know, by the fact that you have kept their account for some time, their general trading conditions, and whether, because of their general trading conditions, some help is advisable or otherwise? - Yes, we shall know something about them. The length of time we have known them often determines the extent to which we are prepared to help, and we will be more likely to help the older customer than the newcomer, perhaps.

1665. Mr. Emerson: Would it not be true to say you are probably kinder to a limited company than to a sole trader? - No, I would not say that. The limited company I suppose by and large would deal in larger figures.

1666. Yes, but your subrogation arises in the company which does go into liquidation, does it not? - Yes, that is so.

1667. I was wondering whether you tended to be more kind to companies than to individuals, relying on the subrogation. - No, I should think we are in sympathy with the human customer rather than the impersonal one.

1668. Mr. Peirce: Because you know the way he has conducted his account, really? - We know the man personally.

1669. Chairman: I think there was only one other matter I wanted to ask you. It has been suggested that somewhere in the Act there should be a duty on a banker who has notice of a petition to retain all security, direct or indirect. Have you any strong feelings, or indeed any feelings, about that? The suggestion is that the banker who has advanced money to a customer either on the customer's own security or on collateral security and gets notice of a petition, notwithstanding any agreement to the contrary, should hold those securities until the result of the petition is known. - (Mr. Marwood): Even should the advance be repaid? - (Chairman): Yes.

1670. Mr. Emerson: I think the witness went further than that. I think the suggestion was that where an overdraft is obviously being repaid and no payments out are being made, the bank should be put on enquiry automatically and should retain the securities for six months, whether bankruptcy ensued or not. - (Mr. Bell): If we had notice of a petition, I do not think the banker would in fact return the security.

1671. Chairman: But you would if it was collateral, would you not? - (Mr. Galpin): Not as the law now stands, no. - (Mr. Bell): We should try not to, anyhow.

1672. Mr. Lloyd Williams: If the guarantor insisted on your returning the securities, what would happen? Suppose he brought an action against you, could you legally resist handing them over, as the position is today? - (Mr. Galpin): We should surely take a very strong line here, because we should be up against this fraudulent preference business.

1673. But technically could you refuse? Do you not think it is better that you should be given power to refuse? - Yes, better to have definite power to refuse.

1674. Chairman: The power could take the form of a duty; if the Act provided that, notwithstanding any agreement to the contrary, you were to retain the securities, and the surety then brought an action against you, you could in effect plead not guilty by statute. - (Mr. Bell): That is on receipt of notice of petition, is it?

1675. Yes, on receipt of notice of petition. - How are we going to get that?
1676. I can see a petitioning creditor who happens to know where his debtor banks, immediately advising you "I have filed a petition against AB". - (Mr. Galpin): Or the customer himself says "I have filed my petition". - (Mr. Bell): I am a little nervous of this question of the banker receiving notice of the petition. We cannot be expected to search.
1677. Mr. Lloyd Williams: If you are not told by somebody that the petition has been presented, you are all right, but if you are told that there has been a petition we want to strengthen your hands. - I am only concerned that the word "notice" should not imply something rather more than we are able to accept.
1678. Chairman: Surely if the words "receives notice" are put into the Act, that does not carry the implication that you are obliged to go round looking out for these things? - No, I think not. - (Mr. Galpin): After all, if you can do things without notice of the presentation of the petition, you can define what is with notice.
1679. I am sure that we should all agree with you that the banks should not be put in the position of having to make any searches. - Quite.
1680. Chairman: I do not know, Gentlemen, if there is anything more you want to say to us? That was all I wanted to ask myself. - May I ask you one thing? I was not quite sure from Mr. MacTavish's letter of 10th July, what was intended by the suggestion that Section 47(2) should be amended so as to make it applicable to a banker "having notice" that the account holder is an undischarged bankrupt. We have not had very long to consider that letter, and we were not quite sure what that meant. Section 47(2) at present imposes a certain obligation upon a banker who has "ascertained" that an account holder is an undischarged bankrupt. Is there some point there in the word "notice"?
1681. It is a very small point. We were wondering what constituted ascertainment. We thought it would be quite sufficient, if the banker has notice that the man is an undischarged bankrupt, to impose on the banker a duty to communicate with the trustee or the Board of Trade. - Registration of a receiving order not to be deemed notice?
1682. At present, if the banker is credibly informed in any way that the man is an undischarged bankrupt, and wished to be obstructive, he might well say: "It is quite true that I was told by a bishop or an Official Receiver, or somebody, that the man was an undischarged bankrupt, but I did not know whether it was true or not". - You are trying to ease our position, make it clearer for us, really? - (Mr. Bell): I think this is the point. At the present moment, if bankers become aware or hear of the possibility of a customer being a bankrupt, they search. They must do that, because the result of this Section 47(2) is that if they "ascertain" that the customer is a bankrupt then they must return the cheques thereafter and inform the Official Receiver of the existence of the account. If what you intend is that merely on hearsay a banker is immediately to stop an account and return all cheques, we might be in extraordinary trouble. There might be some confusion over names, different spellings of names, and so on, and having regard to the rumours that go round about small firms being in difficulties, I think our view would be that we would rather retain the word "ascertained" than import some rather nebulous words such as "received notice".
1683. I quite see your point about that. The point is that ascertainment is something quite definite, and notice might include rumour. I think possibly we ought to consider leaving the Section as it is. - (Mr. Galpin): It has worked quite well for forty years.
1684. Has it? - I think we would agree on that. - (Mr. Marwood): Yes, undoubtedly from our point of view. - (Mr. Bell): Yes.

1685. Well, Gentlemen, I do not think we need detain you any longer. We are very much obliged to you for coming. - (Mr. Galpin): May I just clear one point? There was something we have got to think about - could we have a stated case? We were to think about the deeds of arrangement, and I should rather like to have a stated case to consider. You see, we are a deputation from a fuller committee, and I would like to have it in black and white if I may.

1686. The Section that deals with accounts opened by deed trustees, or the idea of the banker being protected in regard to transactions on such accounts, or both? - (Mr. Marwood): It was the two.

1687. Yes, we can send you a copy of the two draft subsections, and if you have got any further views about them you could perhaps write to us. - Yes. Thank you, that should help.

(The witnesses withdrew)

[For Bar Council's written evidence
see page 219 above]

EXAMINATION OF WITNESSES

Mr. Claude Henry Duveen, Q.C.	}	Representing the General Council of the Bar
Mr. Charles William Chandler		
Mr. Muir Hunter		
Mr. Arthur Figgis		

Called and examined

1688. Chairman: Gentlemen, according to my note we are starting your memorandum at the passage dealing with fraudulent preferences, and you are suggesting that other persons than creditors and sureties should be included. Could you explain to us what sort of persons you have in mind? - (Mr. Muir Hunter): The point can be best illustrated by a set of facts. A is a creditor, and the bankrupt pays him within the six months; A has not exerted any pressure of a kind normally recognised, such as threatening to prosecute him or to make him bankrupt. The question is, what was the state of the bankrupt's mind at the date when he made the payment? If the bankrupt was really intending to benefit not A, whom he has no cause to love, but some other person who might be expected to receive benefit or avoid prejudice from A, that would not be a preference under the present Act. The case can be illustrated as a question of principle by the amendment which was introduced in 1913, providing that it should be a voidable preference to pay a creditor with a view to benefiting a guarantor. That specific case of the third party has been provided for by the statute, and the facts of the case of *Re Cutts*, in which this point came specifically to my mind, seemed to me to require some consideration. In *Cutts's* case the Court of Appeal in fact decided in favour of the trustee, on the ground that the bankrupt must be deemed to have had the intention to prefer the creditor, but my own view of the case was that the bankrupt's real intention was to save from ruin an employee of his who was a director of of the creditor company, a building society, and did not intend to prefer the creditor within the ordinary meaning of the word. In argument various possible sets of circumstances were envisaged, such as that a man might pay a creditor who was his brother-in-law, not because he loved him, but because the brother-in-law said he would make it hot for the bankrupt's wife.

1689. Would it not be a very simple case of the kind you had in mind if we suppose that X owes money to A, A in turn owes money to Y, who is X's brother, and X pays A in the hope that A will then pay Y? - Yes.

1690. You suggest that that sort of transaction ought to be within the Section? - I think it is worth consideration. As you will be aware, perhaps, the proof of the bankrupt's intention is one of the most difficult things to establish, and unless you can generally speaking show that they are blood relations or business associates, or something of that sort, you are always liable to be met with the answer; "The onus is on you".

1691. Would you like the law restored to what it was thought to be as a result of *Re Cohen*, that proof that a man was in fact preferred shifts the onus to that man to show that the bankrupt had no intention to prefer him? - I personally would favour that, but I cannot speak for my colleagues. - (Mr. Duveen): I agree entirely.

1692. Have you any views about that, Mr. Chandler? - (Mr. Chandler): Yes, I agree.
1693. Then if we are going to put back the clock about fraudulent preferences, do we want to put it back to the Clauson view or the Eve view about sureties? - (Mr. Muir Hunter): It would certainly simplify procedure, because if you take the case of a bank - I expect you have been hearing this from the bankers
1694. Yes, we have. - If the money is paid into a bank account, which has the effect of discharging the guarantee, you have to go to the bank first. They are rather formidable antagonists who may choose to fight you on their own ground, and it is up to them to take third party proceedings if they think fit.
1695. That means, does it not, that the risk that the surety may have disappeared or himself become insolvent falls on the innocent banker and not on the representative of the debtor's estate? - Yes, I think I would agree.
1696. Do you not think that is wrong? - Yes, personally. It would be necessary of course to provide that the bank might be brought in, in that case, if it were thought that the debtor really intended to prefer the bank as well.
1697. But there are few men who have an affection for a limited liability company, are there, really? - (Mr. Piggis): I would have thought *prima facie* one should sue the person who gets the money and not, in the first instance, the surety, who may or may not turn out to be liable to the full amount in the end, because the usual practice of the banks is to prove, and hold anything they may obtain from the surety on suspense account, and the surety's final liability to the bank may not be ascertained until some long time afterwards. It would be wrong in those circumstances that he should have to provide the full amount of the preference, when his ultimate liability may be a good deal less.
1698. It might create a muddle, it is quite true. - It may be rather hard on the bank, but surely it is rather hard on them for the reason that, if he has disappeared, they have advanced money on a guarantee of a not too good surety.
1699. Yes, that is so. - (Mr. Muir Hunter): May I link up what you were just saying on the subject of "nobody loves a limited liability company"? With all possible respect to the witnesses who have just left, one does come across cases in which a man pays off his overdraft at a bank in circumstances which one would normally think would be suspicious, but everybody says "Nobody loves a bank". It might well be, and is in fact the case occasionally, that he pays off his overdraft to the bank to save the bank manager's skin: the bank manager has been carrying him well above the limit, or even in certain circumstances might be in secret partnership with him, and the bank manager may say: "If you do not pay this off I shall be dismissed". That is an example of another party benefiting.
1700. It is another example of your other persons? - Yes, I was linking it up particularly with your point about the bank.
1701. Do you think it would be a good idea if payments made in the last three weeks, which in fact resulted in a preference, could be attacked irrespective of the debtor's intention? I mean three weeks before petition. - (Mr. Chandler): Not three months?
1702. No, three weeks. - (Mr. Duveen): Should be treated as preferences?
1703. Should be treated as preferences and recoverable as preferences whatever the debtor's intention. There would have to be some protection of course for transactions in the ordinary course of business, and so on. - (Mr. Piggis): I am rather thinking aloud now, but how does that tie up with relation back?

1704. There is no difficulty there, relation back might continue at three months. - Yes, but the payments might be recoverable anyway by virtue of relation back.

1705. They would be, unless the payee could get himself otherwise within Section 45. - It is pretty well only in the case of the debtor presenting his own petition that the suggestion would have efficacy.

1706. You might well get the case of a debtor's payment during the last three weeks to somebody who was in a position to say "I had no notice of the impending bankruptcy, and I took the payment honestly". - (Mr. Muir Hunter): What is sometimes known as putting one's house in order.

1707. Yes. - I think that requires some consideration. - (Mr. Duveen): I do not for the moment see why a man who has threatened proceedings against a debtor, without any notice of an act of bankruptcy, and gets paid as a result of the threat of proceedings within three weeks of the petition, should be in a worse position than a man who gets paid in similar circumstances four, five, six or seven weeks before.

1708. I agree the three weeks is an arbitrary period, but some people feel I think that the difficulties in the way of a trustee trying to recover a fraudulent preference are so great that there should be a short period during which his burden of proof is substantially lightened. I do not say there is any magic in the particular period of three weeks. - You say "substantially lightened", but I thought you were suggesting that in the given period it should be treated as a preference whatever the true facts.

1709. You mean, irrespective of the debtor's intention? - Yes. Forgive me, but that is another way of saying that there should be an irrebuttable presumption that it is a preference.

1710. Yes, if it, in fact, results in one. - But would you not get over the difficulty by transferring the onus in every case to the payee, to prove that there was no preference.

1711. That would mean, in other words, if you restore the position to what it was thought to be after *Re Cohen* the three week business is unnecessary? - Exactly.

1712. Mr. Emerson: With the duty on the trustee to go back for six months in far more detail, if you are transferring the onus to the creditor completely? - No. What I am saying is that where there has been a payment within six months, the onus is on the payee to prove that there has been no fraudulent preference.

1713. Chairman: I think Mr. Emerson's point is this: if that is done, it means that a trustee in bankruptcy in substantially every case must investigate every payment made within that six months period. - He has to do that anyway, has he not? - (Mr. Muir Hunter): In practice, these things stick out like a sore thumb. - (Mr. Duveen): I would have doubted whether there would be any more work put on a trustee in bankruptcy if you shifted the onus, because I agree that in most of the cases it is quite obvious from the facts and it is impossible to dispute it. - (Mr. Chandler): I suppose you have in mind that the payment should be out of the debtor's own monies, not third party money?

1714. Not third party money, no. Another thing that did stick in our minds which I should think you would probably agree about is this: at present, if the bankrupt pays after petition, as in *Re Seymour*, that is unassailable. That is a ridiculous state of affairs. - (Mr. Muir Hunter): Yes. - (Mr. Duveen): Yes.

1715. But that could very easily be put right by a very simple amendment to the Section? - I am very sorry to interrupt, but you said that we had got to fraudulent preference. According to my notes we have not dealt with Nos. 6, 7 and 9 in our observations. It may be that you have no questions, of course.
1716. I thought we discussed No. 6 last time? - I beg your pardon; you are absolutely right. We did deal with No. 6.
1717. I have a strong recollection of that. - Yes, I am very sorry. We did not deal with No. 7.
1718. No. 7; that is "After-acquired Earnings"? - Yes. It may be that you have no questions.
1719. I think the easiest thing would be for you just to run your eye over a revision of Section 51 which you will find opposite page 40. Perhaps before you look at that I should tell you that we had under consideration whether we would not suggest taking away the necessity for the written consent of the chief officer in subsection (1) and, instead, providing that the Court must consult the chief officer. - (Mr. Chandler): As regards the Army and Navy, I understand it was the practice of the Navy never to consent to an order and it was the practice of the Army to consider each individual case. It was the same with the Customs. I thought you might like to know that because, particularly in regard to certain officers in the Navy, such as navigation officers and submarine officers, the Navy took particular care that they should not be worried with financial difficulties having regard to the personnel in their charge and the value of the property at stake.
1720. That is very interesting; thank you very much. - (Mr. Figgis): The intention here is to take in the earnings of the professional man. Say a doctor who is in private practice?
1721. The person we are particularly thinking about is the one who causes great difficulty at the moment, and that is the variety artiste. - And who is in receipt of other remuneration. - (Mr. Chandler): It not infrequently happens when one is dealing with an employee of a firm and the Court has made an order for payment direct that they promptly dismiss the man.
1722. I do not see how you can stop them doing that, do you? - No.
1723. I do not know if you have had time to consider this rather lengthy Section? - (Mr. Figgis): As far as I am concerned, it has taken in everything that we had in mind. - (Mr. Duveen): It appears to cover it, yes.
1724. That brings us to deeds of arrangement. - (Mr. Chandler): Perhaps you would like me to mention this: there was a conference between Mr. Justice Clauson and Mr. Justice Luxmoore and Mr. Justice Farwell and they went into this matter of the lack of control of the Board of Trade over trustees.
1725. Deeds trustees? - Yes. It arose out of a case before Mr. Justice Luxmoore. The three Judges had a meeting at which I was present, and after discussing the matter they requested me to obtain an appointment with the Inspector General of the Board of Trade, as representing them, to enquire exactly what powers the Board of Trade had over trustees. I kept that appointment and saw the Inspector General, and reported back. There was another conference with the Judges, and of course it was perfectly clear then that the Board of Trade had no inherent power over trustees in deeds of arrangement, and their Lordships thought that in the circumstances there should be some power. They thought that there should be incorporated in the then Deeds of Arrangement Act a power to make an order of supervision analogous to that in company's winding-up.

They thought that that would be a short way of giving the Board of Trade the fullest possible control in those circumstances over deed trustees.

1726. Mr. Emmerson: Company's voluntary winding-up or compulsory winding-up? - Voluntary winding-up. The Court might, on application, make a supervision order and give all necessary directions in regard to it. a very wide authority.

1727. Chairman: A deed of arrangement is, after all is said and done, a contract. - That is exactly what was thought.

1728. And it is paramount public policy that you do not lightly interfere with the sanctity of contracts. - Yes, every deed of arrangement is a contract.

1729. And the Board of Trade is not a party to it. - No. Therefore the application should be made to the Court by the Board, in suitable circumstances, to make an order for supervision. Then the Court would construe the deed of arrangement and given any necessary direction as they thought fit. But they did not think it desirable that the Board should be given carte blanche power to interfere.

1730. What would you say to this idea which certain witnesses have put forward to us: that if the creditors, or a majority of them, think that the arranging debtor has been guilty of misconduct, either before or after the deed, the trustee should have power to apply to the Court for a receiving order and the receiving order should operate as if it were made, at the date on which it was made, on the debtor's own petition? - (Mr. Duveen): "Shall have power to apply to the Court" or "should be his duty to apply to the Court?"

1731. I think we made it his duty to apply and gave a discretion to the Court. - (Mr. Chandler): Where there has been a breach of the conveyance?

1732. No; we purposely left it at the wide word "misconduct". The experience of the witnesses was of an arranging debtor who prevented the trustee from taking property assigned to him with a shotgun. - (Mr. Muir Hunter): It is true, of course, that once the deed has become binding by lapse of time and has been assented to, you can never have a bankruptcy petition thereafter by any creditor. I think it is desirable in a special case. - (Mr. Duveen): Yes, we think that is a good idea.

1733. We do not want to bother you with all the detail of this, but you quite approve of the idea in principle? - Yes. (Mr. Figgis): I am a little doubtful about it because it seems to me like putting a weapon in the hands of the creditors in effect to do what they have contracted not to do.

1734. Yes, it does. On the other hand, the debtor is protected by the Court from the unfair use of that weapon. - Yes; there would have to be proof of sufficient misconduct. - (Mr. Chandler): Superlative misconduct; grave misconduct; not mere misconduct.

1735. It might have great advantages to creditors, supposing they found out within, say, a month of the deed that immediately before executing the deed the debtor had paid off his friends in full. - (Mr. Muir Hunter): Of course, in that connection there is no power under the deed to challenge a fraudulent preference.

1736. If the Court found that the payment amounted to misconduct, this Section might be helpful to creditors. - (Mr. Chandler): Frequently the deed provides for a preference, in the administration.

1737. But that is a different thing. I was thinking of preference before the deed which would, in bankruptcy, be fraudulent preferences, so-called. - (Mr. Figgis): I wonder if that would amount to misconduct?

1738. I imagine that that would depend on circumstances, would it not? - (Mr. Muir Hunter): There is a clause current in all the printed deeds which says at the end - in the Solicitors' Law Stationery Society deed - "if the debtor shall have concealed any part of the property exceeding fifty pounds, this deed shall be void" - most inept words. I think something as you suggest might be a better alternative.
1739. What you are saying rather answers the next question I was going to ask you, which was whether you think that a model form of deed, fixed by statute, is desirable or not? - (Mr. Figgis): Yes. - (Mr. Chandler): I think it is, one which incorporates the provisions of the Bankruptcy Act with regard to the administration and distribution of the bankrupt's property. In *Re Casse*, [1937] Ch.405, 1937(2) L.T.R.528, where the deed did not incorporate the bankruptcy sections as regards proofs, Mr. Justice Luxmoore dealt with the point very thoroughly that the meaning of the words "creditors", "debtors", or "debts" in the deed must be construed in the light of the terms in the deed of arrangement.
1740. You do not think it should be compulsory? - (Mr. Figgis): No, but I think there should be a standard form. The reason I say that there should be a standard form is merely echoing what you said earlier on, that this is a contract between three parties and they are entitled to make whatever contract they like and if, owing to the particular circumstances of the case, the standard form would not fit what they required, they should be able to make their own. - (Mr. Muir Hunter): I agree.
1741. In that case, does the standard form serve any purpose more useful than a stuffed pike hanging up in a bar parlour? - (Mr. Figgis): In practice, yes, because people use it.
1742. Mr. Lloyd Williams: Is there any point in having a statutory form if it is optional? - (Mr. Duveen): None at all.
1743. Chairman: Have you any views on the question of what sort of deed ought to be registered, because it occurred to us that unless money or property passes, or is going to pass, from the debtor to the trustee under the deed there is really no point in having a registration of it. Take, for example, the pure deed of composition in which a third party can put money into the hands of the trustee and pay X shillings in the £ to the creditors; do you think there is any need to register a document of that kind? - I cannot think of any offhand. - (Mr. Chandler): In one payment or a realisation of property over a period?
1744. Not realisation at all; a pure composition in which the money is going to be put up and distributed. - (Mr. Duveen): Coming back to your last question, I think we are agreed that under the present Act such a deed of arrangement would be caught, but there does not seem to be any reason why it should be caught - why it should be necessary to register it. - (Mr. Muir Hunter): The only conceivable justification I can think of is that it constitutes a record of the debtor's insolvency, being a question which is material in any subsequent bankruptcy. That is the only reason I can think of.
1745. You do not register other acts of bankruptcy. There is no particular point in registering this one merely because it may be an act of bankruptcy? - Not an act of bankruptcy. I can best illustrate this by referring to Section 26 and the concluding words of the public examination "Have you ever made a composition with your creditors?" If you have, it is equivalent to bankruptcy for purposes of conduct.
1746. It is hardly worth bothering to register it just for that purpose? - (Mr. Duveen): No.
1747. I do not think we dealt with your suggestion about Section 18. - You said last time that you were not allowed to deal with the Rules.

1748. If your suggestion were adopted, it would be an amendment to the Act, bringing the Rules into the Act itself. - This arises out of *Re Fletcher*. There is no doubt that at present the Act and the Rules say two quite different things.

1749. What you want is simply an amendment to the Act which would incorporate the existing Rules? - Yes. - (Mr. Muir Hunter): We want to make an honest woman of the Act.

1750. Or an honest woman of the Rules? - (Mr. Duveen): The Act and the Rules should read the same.

1751. If we may pass on, I do not myself quite understand why you want to fuse Sections 45 and 46, one of which deals with payments etc. to and the other to payments by, the bankrupt. - (Mr. Muir Hunter): Old Section 45(b) refers to payment or delivery to the bankrupt and so does Section 46. One is impeached by notice made of a bankruptcy; the other is impeached by notice of petition. Section 46 was inserted in 1913 to overcome the difficulties that arose where a plaintiff, who had committed acts of bankruptcy of which the defendant knew, sued the defendant for sum of money. The defendant could not pay the plaintiff because of an act of bankruptcy and it was not considered that he should pay in Court because the proceedings would be stopped short. Therefore, as you have in this case notice of an act of bankruptcy but not of a petition, you could pay a debtor who *ex hypothesi* had committed an act of bankruptcy, or his assignee. Section 46 was grafted on to the Act without sufficient consideration being given to Section 45.

1752. Do you think it would be possible or desirable in Section 45, provide (i), to put in the words "before the gazetting of the receiving order and without notice thereof"? That, we thought, would possibly make it quite unnecessary to preserve the very complicated and difficult Section 4 of the 1926 Act. - Subject to the stay of advertisement having been granted, which might last for months.

1753. It might indeed. - (Mr. Chandler): Before the publication of the advertisement?

1754. Yes. - That would meet Section 4 and combine the two Sections.

1755. If we had that in Section 45, you would not need Section 4 of 1926. Do you see any objection to getting over the difficulty in that way? - (Mr. Duveen): No, I do not.

1756. What we could not see how to do was to ensure that the Court should realise that, if they stay an advertisement, they are doing a very, very serious thing. I am afraid it is not always realised as much as it should be. But we do not see how one can make sure of that. - (Mr. Muir Hunter): Section 4 is no good as it stands.

1757. It is an awful conundrum. - The only known case was heard before the Chief Registrar of Friendly Societies, who battled magnificently with it.

1758. You think Section 54 wants general reconsideration and redrafting? It is rather a muddle as it stands. - (Mr. Figgis): I do not know whether this is a matter for express provision. The conflict between this Section and the Rent Acts has now, I think, arisen on two or three occasions; I think there have been decisions on the point in the County Court. One gets this situation: a tenant in possession of rented controlled premises, his trustee disclaims, the landlord applies to the Bankruptcy Court that a sub-tenant either take a lease or be barred from any right, title or interest in the premises, the sub-tenant having previously been a controlled tenant; the landlord then goes to the County Court and says "You have been barred from any right, title or interest and that includes your rights under the Rent Acts".

1759. Do you think we are bound to solve that by amending the law of bankruptcy? I think we shall go round that fence. -
(Mr. Muir Hunter): Do not deprive us of all our cases.
1760. As regards your idea of transferring a motion without transferring the whole bankruptcy, that could be met quite simply by putting into the transfer Section, after "the proceedings", the words "or any part thereof". - (Mr. Duveen): I think so.
1761. Anyhow, it is a very simple bit of drafting. - (Mr. Figgis): It would be extremely useful. - (Mr. Muir Hunter): There is a shorter and less complicated point that I had in mind when we were discussing this, and that is that the words in Section 54 which refer to vesting orders of part of the disclaimed property might perhaps be made a little clearer. If you have a house consisting of four flats, it would appear - it is not very clear - at the present time that the Court can make a vesting order in favour of each sub-tenant of his flat. It is not entirely free from difficulty, but it could be done.
1762. You think that it should be possible and clearly possible; is that right? - It is very curiously worded. In Section 54 subsection (6) proviso, after clauses (a) and (b), it goes on: "... and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order"
1763. It is expressed rather in the manner of the looking glass. It should be the other way round? - Yes. Such an order is reported to have been made in cases of areas of building land with separate plots, if I remember rightly.
1764. As to deceased insolvents, we are proposing to do what you suggest to get over the obstacle. I think the simplest way would be by enabling the Court to dispense with service, would it not? - (Mr. Duveen): Yes. There is no one to serve on.
1765. Service of notices out of jurisdiction: you would like that provided for in like manner? - Yes, entirely.
1766. Do you think that the time for compliance with the bankruptcy notice is too long, or should it be left? - We think it is long enough.
1767. I think one thinks about the time for compliances and the time for filing an affidavit of counter-claim as very much too short. - (Mr. Chandler): I would suggest that the time for compliance should be fourteen days and the time for filing an affidavit should be seven days. It would enable the client to find a solicitor, but in seven days it is rather difficult.
1768. There is one other thing which affects you. We were considering giving the House of Lords power to sanction an appeal to itself. That, I should have thought you would favour? - (Mr. Duveen): Yes, from every point of view.
1769. There is one other point I wanted to deal with; I am rather surprised that you did not mention it. Do you not think that something ought to be done about counsel's fees still, as it were, earmarked in the hands of the bankrupt solicitor. If I remember, Clauson J. said that you are not entitled to be paid on the basis of it being trust money and you have not even the right of proof. - (Mr. Chandler): I think the trustee will admit a proof, provided the solicitor has received the money.
1770. Surely there is no right of proof? - Mr. Kingham established a right of proof where the lay client had, in fact, paid to the bankrupt solicitor the counsel's fees.

1771. Be that as it may, if the lay client has paid the fee to the solicitor and if, applying the rule in Clayton's case and Re Hallett's Estate, you make sure that the money is still in the solicitor's bank account, it seems to me that counsel should be paid in full and it should be treated as trust money. - (Mr. Muir Hunter): That question is in the hands of the Bar Council at the moment and I was asked to write a note on this point. After consideration it seems to me that there is absolutely no right of proof at all. Furthermore, counsel has been acting for the bankrupt, and I can imagine certain creditors would desire to challenge the validity of counsel's advice or actions, which they presumably would be entitled to do. - (Mr. Chandler): As a matter of fact, I am engaged on a case in which four counsel have submitted proofs to the Official Receiver. - (Mr. Figgis): Probably, where the money is still earmarked, say, in a client's account, or is later recovered by the trustee in bankruptcy from the lay client, the trustee would probably be under an ex parte James liability to pay counsel in full.

1772. I cannot speak for my colleagues because we have not considered this, but I should have thought that we could have strengthened your hands if, after the words in Section 38 "property held by the bankrupt on trust for any other person", you put "including", in the case of a bankrupt solicitor, counsel's fees". - There is a little difficulty about that because that means that the trustee in bankruptcy could not recover from the solicitor's lay clients the whole of their commitments.

1773. Yes, he could, if he had part in trust for the creditors and part in trust for counsel. - Under Section 38, the right to recover counsel's fees would not vest in him. You say that you have not discussed this, but that possibility crosses my mind.

1774. We will bear that in mind when we do come to discuss it. - As this affects the Bar in general, I for myself would not desire to influence the minds of the Committee on a matter which the Bar Council have not so far had an opportunity to consider.

1775. When will the Council have a chance of considering it? - I have given them this memorandum. I can leave a copy with the Committee if they would like to see it. Could you possibly invite the Bar Council to make a submission on it?

1776. I was going to suggest that perhaps they might like to let us have a supplementary memorandum, merely a note in writing as to what their views are. - Then could I leave that with one of your Secretaries?

1777. I should be very grateful indeed. I think that is all we wanted to ask. Thank you very much, Gentlemen, I am sorry you had to come again.

(The witnesses withdrew)

Monday, 24th September, 1956

Present

HIS HONOUR JUDGE FLAGDEN (Chairman)
 MR. C.E.M. EDMERSON, F.C.A.
 MR. H.E. PEIRCE, O.B.E., J.P.
 MR. B.E.P. MACTAVISH } Joint
 MR. C. ROY WATERER, I.S.O. } Secretaries

MEMORANDUM SUBMITTED BY THE BOARD OF INLAND REVENUEIntroduction

1. The extent of the Inland Revenue interest in bankruptcy law and practice is shown by the following table comparing the number of Receiving Orders made on Petitions presented by the Commissioners of Inland Revenue with the total number of bankruptcies for the calendar years 1938 and 1947 to 1955.

<u>Calendar Year</u>	<u>Receiving Orders on Petition of C.I.R.</u>	<u>Total bank-ruptcies</u>	<u>C.I.R. Petition cases as percentage of total</u>
1938	approx. 25	3,117	.8%
1947	62	661	9%
1948	133	1,132	11%
1949	145	1,491	10%
1950	173	1,823	9%
1951	166	1,816	9%
1952	167	2,043	8%
1953	257	2,222	11%
1954	321	2,247*	14%
1955	320	2,197*	14.5%

Moreover, it is safe to say that debts for one or more of the taxes administered by the Board figure among the liabilities of most of the Debtors in respect of whom Petitions are presented by other creditors.

2. The most important cause of the striking increase as compared with pre-war in the number of cases in which the Board has felt compelled to resort to bankruptcy proceedings was the passing of the Crown Proceedings Act, 1947, Section 26(2) of which applied the provisions of Sections 4 and 5 of the Debtors Act, 1869, to debts due to the Crown, with the exception of sums payable in respect of Death Duties and Purchase Tax. Until 1947 debts owing to the Crown were outside the provisions of the 1869 Act, which went a long way towards abolishing imprisonment for debt, and the Inland Revenue was able to rely largely upon old forms of Writs of Execution, in particular the Writ of Capias ad Satisfaciendum. There is no doubt that the prospect of a term of imprisonment persuaded very many dilatory taxpayers to meet their obligations to the community, and, although the Board was obliged to issue many warnings, only in a very few cases were debtors actually committed to prison. (The Board did not, of course, use the Writ of Capias if they were satisfied that the debtor was not giving unreasonable preference to other creditors and was genuinely unable to pay his tax debts in full or to increase the rate at which he was discharging them.) Other forms of execution or bankruptcy proceedings were relied on mainly where

* These figures have been compiled from the "London Gazette".

the circumstances of the case and the size of the debt were such that the defaulter might well have thought that a term of imprisonment (which, as a matter of public policy, could hardly be allowed to last longer than a few weeks) would be worth enduring for the sake of expunging the debt.

3. The Crown Proceedings Act, 1947, and a variety of other circumstances have made the problem of collecting tax debts in the relatively few intractable cases much more difficult in recent years. The great majority of taxpayers are, of course, dealt with by the normal tax collecting machine and clear their liabilities in commendably quick time. With the remainder, however, involving those who are naturally bad payers or who have fallen on difficult times, the Board's officers make every effort, by correspondence and if necessary personal calls, to obtain full details of the taxpayer's circumstances and the reason for his default and, in appropriate cases, offer to accept instalments over a reasonable period. If unjustifiable delay in payment continues and recovery by way of distress or summary proceedings is barred by time, the amount of the debt or other circumstances, judgment is obtained. Failing payment, all the known circumstances of the case are then reviewed by the Board. They may, as a result, decide in cases of exceptional hardship not to press for payment, or they may make a further attempt to agree reasonable instalment arrangements, or they may decide that the judgment must be enforced without further delay. If the decision is to enforce the judgment, consideration is then given to the possibility of using other means of enforcement than bankruptcy proceedings. Only where these seem inappropriate is the assistance of the Bankruptcy Court sought so as to ensure a proper division of the assets between the creditors.

Priority of Debts: Section 33, Bankruptcy Act, 1914.

4. With one important exception the Inland Revenue's status under bankruptcy law is that of an ordinary creditor. The exception is the preferential right accorded to certain tax debts by Section 33(1)(a) of the Bankruptcy Act, 1914, and by provisions in tax legislation. The Committee will no doubt wish to have the Board's observations on this question.

5. The antiquity and extent of the Crown's prerogative in the recovery of debts at common law is indicated by the following passage from the judgment of the Privy Council, delivered by Lord Macnaghten, in Commissioners of Taxes for New South Wales v. Palmer [1907] A.C. 179 at page 182. His Lordship said: "In Rex v. Wells 16 East, 278, 282, in a passage which has been often cited, Macdonald C. B. says: 'I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred'. Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by Lord Coke in Quick's Case [1611] 9 Rep. 129b. From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently." This privilege extended to all assessed taxes until 1849, when legislation limiting the extent of Crown preference on the matter was enacted. In Food Controller v. Cork [1923] A.C. 647, the House of Lords held that the prerogative had been given up in exchange for the statutory right of priority for an amount not exceeding tax in respect of one year's assessment.

6. Against this historical background the provisions of the second part of Section 33(1)(a) and previous enactments back to 1849 are seen not to create a position of special privilege for Inland Revenue duties, but to introduce limitations to the position previously existing. The general effect of the present law is to recognise the special nature of a tax debt to the Crown but, in the interest of other creditors, to impose a ceiling to the amount which may be treated as preferential.

7. Apart from history the case for preference can, the Board submit, be justified on a number of grounds. In the first place, there is the consideration that an obligation incurred to the community at large, whether it is of a monetary nature or not, is of a different character from one incurred to a private individual. This consideration has particular force in the case of tax deducted by a bankrupt from the remuneration of employees under P.A.Y.E. which, by Section 30, Finance Act, 1952, was made preferential to the extent of the amount so deducted in the 12 months next before the date of the Receiving Order. It is not, of course, all debts to the Crown which fall within this special category; what may be called ordinary commercial debts (e.g. those due to Government Departments for rent of premises or hire of machinery) are in no different position from a commercial debt to a private person and the provisions of Section 33, from which the Crown's preferential rights arise, are confined to such debts as those for taxes and National Insurance. This limitation suggests the second justification for the present scope of preference.

8. The obligations which now rank in priority are all of a kind which are incurred automatically under some provision of the law and are not obligations entered into by a creditor voluntarily. The business man only gives credit to customers if he thinks the risk of default or delay in payment is worth taking; he can threaten to cut off further supplies altogether if a debtor appears likely to default. The Revenue Departments and the rating authorities have no such choice as to whether or not they should enter into financial transactions with a particular individual; they are involved willy-nilly. This point was made in debate during the Committee Stage of the 1947 Companies Bill when an amendment was moved to abolish the corresponding preferential rights in company liquidations. The then Solicitor-General said:

"We feel that the general body of citizens in their capacity as creditors as a State must come before the claims of individual creditors who are free to accord or refuse credit to the company while the general body of citizens are not free to do so."
[Parliamentary Debates, Standing Committee B 3/7/47, Col.247.]

9. There is a further consideration arising from the special position of the Revenue Departments and the rating authorities. A supplier, by reason, for example, of his ability to refuse further supplies, is in a much stronger position up to the date upon which a bankruptcy takes effect and the experience of the Board is that the sanctions open to the private creditor result in his receiving some preference in practice over tax creditors until a Receiving Order is made. In many cases the statutory preferences laid down in Section 33(1)(a) go only some part of the way towards restoring an equitable position.

10. The Committee will be aware that the Board are able to choose (except in the case of tax deducted under P.A.Y.E.) which year's taxes should rank for priority, whereas for rates and National Insurance only those debts becoming due in the year immediately preceding the Receiving Order are preferential. This option was affirmed by a decision of the Court of Appeal in 1950 in re Pratt (a Bankrupt) ex parte Commissioners of Inland Revenue v. Bernard Phillips ([1951] Ch. 225; 31 T.C. 506).

11. There are, in the Board's view, good reasons for this difference in treatment. Rates and National Insurance contributions, the Board assume, do not normally vary substantially in amount from year to year. Moreover, as these liabilities are readily ascertainable in amount in most cases, a Receiving Order would presumably normally be made within twelve months of the due date of payment of the oldest arrear. In the case of taxes assessed upon income, however, these frequently fluctuate widely from year to year and it may inevitably be some considerable time after the income has accrued before they are discovered and determined, particularly in the case of negligent and unscrupulous taxpayers.

12. In this connection the Board would draw the Committee's attention to the following remarks of Jenkins, L. J., in re Pratt cited above, regarding a suggestion that the preferential assessed taxes, etc.,

were those for the twelve months ended 5th April next before the date of the Receiving Order: -

"I think it would be an unreasonable result if where a bankrupt with a diminishing income incurred large tax liabilities, say, two or three years before the date of the Receiving Order, and incurred no such liability in the financial year immediately preceding that date there was no priority for any of that tax because (although it was unpaid tax which had been duly assessed on the bankrupt) it all related to a year or years earlier than the last complete fiscal year preceding the date of the Receiving Order. I think that this result of the construction placed on the subsection by the Divisional Court would really contradict the primary provision to the effect that all assessed taxes are to rank for priority subject to the qualification later imposed." (Vol. 31 Tax Cases, page 526.)

13. In short, the method of applying the principle of preference which leads to the greatest degree of consistency in treatment between case and case is, in the Board's view, that embodied in the present legislation and there is no doubt that to bring the preference for Inland Revenue duties generally into line with that for rates and National Insurance contributions would radically reduce the Exchequer yield in bankruptcies.

Observations on the particular matters referred to in Paragraph 3 of the Joint Secretary's letter of 2nd November, 1955

14. The sub-paragraphs below are numbered to correspond with those in the Joint Secretary's letter.

(1) Discharge of Bankrupts. The experience of the Board does not suggest that any change in the present procedure is required, but they would not object to the introduction of an amended procedure on the lines of the scheme outlined in the Appendix to the Joint Secretary's letter of 2nd November, 1955. Any such amended procedure might well, in the Board's view, contain further safeguards for creditors. Thus, for example, where the conduct of the bankrupt subsequent to the Public Examination calls for censure or is otherwise objectionable it should be open to the Official Receiver, Trustee or creditor to apply to the Court for a reconsideration of the automatic discharge. A provision along these lines should be additional to any "caveat" which might be entered at the conclusion of the public examination as suggested in the scheme outlined in the said Appendix.

(2) The Board have no comments to offer on this point.

(3) Monetary Limits. The Board wish to comment only upon the monetary limit of £50 in Section 4, Bankruptcy Act, 1914. They doubt whether there are good grounds for making a change in this figure despite the fact that it was introduced at a time when the £ was worth a great deal more than it is to-day. The Debates in the House of Commons during the passage of the 1869 Bankruptcy Act indicate that the reason for adopting £50 as the minimum limit was that this was the amount above which imprisonment for debt was abolished by the Debtors Act of the same year. A few years later imprisonment was abolished for debts below £50 and the original reason for adopting it as a significant amount for bankruptcy purposes then disappeared. It has no doubt been retained as a "de minimis" figure and as such the Board regard it as a reasonable one even in the changed conditions of the present day. In this connection they

note that the increase in the normal amount of taxed costs incurred in a bankruptcy has risen by only about £5 to £7 since 1914 (see Table below*),

(4), (5) and (6). The Board have no comments to offer on these three points.

(7) Section 51, Bankruptcy Act, 1914. There is no statutory definition of the words "salary or income" as used in Section 51(2) of the Bankruptcy Act, 1914, but judicial interpretation of the words has tended to confine them to a somewhat limited field. Thus, for example, Ex parte Benwell ([1884] 14 Q.B.D. 351) indicated that the words point to some definite annual amount coming to the bankrupt and that "income" did not include the prospective earnings of a professional man in the exercise of his personal skill and knowledge. It may be said that, broadly, the type of earnings to which the Sub-section in question has been held to apply are those to which the Income Tax P.A.Y.E. system also applies.

It is uncommon for the Inland Revenue to be greatly concerned in bankruptcies where the debtor's only income is from a P.A.Y.E. source since the P.A.Y.E. system keeps the taxpayer up-to-date with his tax liability. Section 51 in its present form is, therefore, of little assistance in Revenue cases and the Board would welcome amendments enlarging the scope of its provisions so as to cover, for example, professional earnings outside P.A.Y.E., in particular, the earnings of actors and artistes.

(8) and (9). The Board have no comments to offer on these points.

15. Further particular matters

The Board also wish to draw the Committee's attention to the following matters.

(1) Section 11, Bankruptcy Act, 1914. In a few cases a bankrupt has received a repayment of tax after the Receiving Order has been made but before it was advertised. A second repayment has then had to be made to the Trustee in Bankruptcy. In view of the rarity of such cases and the relatively small amounts involved the Board do not wish to make any specific recommendations on the matter. They observe, however, that the British Bankers' Association raised the matter with the 1925 Committee on Bankruptcy Law (paragraph 47 of that Committee's Report) and it is possible that it may do so with the present Committee. The Board would like to put on record, therefore, that they also have been affected by the time lag between the making of the Receiving Order and its public notification.

(2) Section 31, Bankruptcy Act, 1914. The Board of Inland Revenue understand that the question of Inter-Departmental set off is to be the subject of observations to be addressed to the Committee by the Treasury.

(3) Wording of Section 33(1)(a), Bankruptcy Act, 1914. In paragraphs 4-13 of this Memorandum the Board observe generally on the preferential position of claims in respect of Inland Revenue

* Estimated Taxed Bills of Costs, Bankruptcy

Lower scale is applicable either where the yield in bankruptcy is less than £300 or where dismissal of the Petition is due to a third party paying the debts.	<u>Minimum of Scale</u>	<u>Lower</u>	<u>Higher</u>
	1914	£24. 0.0	£30. 0.0
	1917-1919	£25.10.0	£32.10.0
	1919-1932	£26.15.0	£33.10.0
	1932-1936	£27. 0.0	£34. 0.0
	1936-1944	£27.10.0	£35. 0.0
	1944-1955	£29. 0.0	£37. 0.0

duties. In addition to the general matters there considered, they would wish to draw attention to the discrepancy between the wording used in Section 33 of the Bankruptcy Act, 1914, and Section 319 of the Companies Act, 1948, the relevant passages from which are set out in the footnote.*

In addition to the taxes expressly mentioned in Section 33(1)(a) the same priority as that given for Income Tax applies to the Profits Tax (formerly National Defence Contribution) by Paragraph 5 of Part III of the Fifth Schedule to the Finance Act, 1937, and Excess Profits Tax is included by virtue of Section 21(2) of the Finance (No. 2) Act, 1939. Moreover, the Board are advised that the wording now appearing in Section 33(1)(a) is adequate to cover other taxes and duties entrusted to their management. No difficulties, therefore, arise over the existing wording in Section 33(1)(a), but in order to make comparison simpler between the Companies Act and the Bankruptcy Act, it is suggested that the latter Act be amended to read as in the Companies Act.

(4) Section 42(1), Bankruptcy Act, 1914; avoidance of certain settlements. The Court of Appeal in Ex parte Official Receiver In re Gould ([1887] 19 Q.B.D. 92) held that Section 47 of the Bankruptcy Act, 1883 (which corresponds with Section 42 of the Bankruptcy Act, 1914), did not apply where an administration order had been made under Section 125 of the Bankruptcy Act, 1883 (which as amended by Section 21 of the Bankruptcy Act, 1890, corresponds with Section 130 of the Bankruptcy Act, 1914); and the Board are advised that similarly Section 42(1) does not apply to an insolvent estate in respect of which no order has been made under Section 130.

This interpretation of Section 42(1) does not give rise to difficulty in cases within Section 172 of the Law of Property Act, 1925, which renders voidable certain conveyances of property with intent to defraud creditors. The definition of conveyance in that Act, however, applies only, the Board are advised, where there is a written instrument and does not apply to, for example, gifts of money. There would seem, therefore, to be no provision in the present law which can be used to recover for the benefit of an insolvent estate any sums given in cash form to relatives, etc., shortly before the death of the donor.

The Board suggest that this defect in the provisions of Section 42 should be corrected.

(5) Insolvent Estates. The attention of the Board has been drawn to the difficult position in which creditors are placed where the Executors of a deceased debtor's will or the persons entitled to a grant of letters of administration of a deceased debtor's estate, as the case may be, refuse or are unwilling to take out a grant of representation because the deceased's estate is insolvent. Under Section 130 of the Bankruptcy Act, 1914, a creditor may petition for an order for the estate of a deceased debtor to be administered according to the laws of bankruptcy. It was held, however, in Re a Debtor ([1939] Ch. 594), that the Court has no jurisdiction to make an order under this Section until a legal personal representative of the deceased debtor has been constituted by the grant of

* Section 33, Bankruptcy Act, 1914 - (1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts -

(a) ... all assessed taxes, land tax, property or income tax assessed on the bankrupt up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment;

Section 319, Companies Act, 1948 - (1) In a winding up there shall be paid in priority to all other debts -

(a) the following rates and taxes -

...
(ii) all land tax, income tax, profits tax, excess profits tax or other assessed taxes assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment;

between the potential bankrupt and the ordinary taxpayer who may be dilatory in a particular year, and we would not wish to apply the big stick to everybody.

1791. You do not think that cutting down or abolishing the right to choose your year would have any effect on the amount of rope which is given to the taxpayer? - I do not think it would affect our present policy. It is a matter of policy how much rope is given.

1792. I do not know what you would think of this - it is something which I have not consulted my colleagues about - but it occurred to me as being a possible formula that you could, at your option, choose either the last year, as Customs and Excise have to do, or a fraction of the total sum in which the numerator was one, and the denominator the total number of years during which he has to pay tax. If the bankrupt managed to run for three years, you would be entitled to the last year, or one-third, whichever you like. - One-third of the total?

1793. Yes, of the total. - That is quite a new one on us.

1794. It is entirely new, I have just thought of it. It would lead, probably in most cases, to your not getting quite so much in priority as the general run of creditors. - The choice then is between the highest of the three and the average?

1795. That would in effect be the average. - Or the last year?

1796. The last year or the average. - In the case of most bankrupts the last year would not be much good to us.

1797. The present position is that you take your best year, and the other proposal, which we have not considered as a Committee, could be to take the average over the three years. - I think it would cut down our priority rights quite substantially.

1798. I think in the majority of cases it would result in a fairly appreciable reduction in the amount that would come under priority, but it would still leave you some priority which, my own feeling is, you ought to have. - I am just wondering what the philosophy behind the proposal is.

1799. We have had a good many people who have expressed the view that the result of your being allowed to pick your year is that really an unfair proportion of the assessment is apt to find its way into the Revenue. - I fully understand the views of people who are worried about the extent of preference, but I was wondering what was the idea behind this graduation according to the age of the arrears.

1800. If the man has been running for a long time without paying his taxes, it means that a smaller proportion becomes preferential which I think a lot of people would feel is rather fairer than picking your year from an indefinite number of years. - It would be giving a bonus to other creditors for our lack of detection.

1801. That would be the effect. - Which would have very many anomalous results.

1802. Could you elaborate that? - I was thinking mainly of cases, particularly back duty cases, where we only become aware of under-assessments many years after the event, and the total duty payable is so great as to make the man bankrupt.

1803. I suppose the case of the film star or actor who goes bankrupt for a large sum suddenly is a typical case in which it is difficult to find out what he really is making, is it not? - Perhaps there is less sympathy with the Revenue in being unable to find out what the actor, who after all is a public figure, is making, but it is very difficult indeed to find out what certain traders are making who do not make any

the wages of his servants, or tax which has been deducted from the bankrupt's wages by his employer. - The bankrupt as an employer deducting tax on our behalf.

1780. In that case the bankrupt is merely acting as an unpaid tax collector is he not? - Yes.

1781. And the ideal man would normally pay into a separate account whatever he takes from his servant's wages and keep it there till the time came to pay it to you? - And he should pay us monthly.

1782. So if you could identify the money deducted under P.A.Y.E. in the bankrupt's hands you would have a strong case; you would have something in the nature of trust money? - Yes.

1783. Mr. Emerson: I am not quite clear here, perhaps you could help me. Take a case where a bankrupt has, in fact, deducted P.A.Y.E. from his employees but has not accounted to the Revenue. He is made bankrupt and you have your preferential claim for the twelve months preceding the receiving order. Supposing there is not enough money to pay all the preferentials and therefore you only take a dividend on that P.A.Y.E., can you go against the employee for the unsatisfied balance? - No, except possibly in very exceptional circumstances. - (Mr. Price): There has been a change in that quite recently. The previous rule was that the employer could pass the onus of paying the P.A.Y.E. tax on to the employee when the Commissioners of Inland Revenue issue a direction, and the Commissioners of Inland Revenue only issue a direction when the failure to deduct was in good faith on the part of the employer, that is he made some arithmetical mistake, or something of that kind. The recent regulations have altered the position. The Commissioners of Inland Revenue are now able, in addition, to make a direction to transfer the onus of payment from the employer to the employee where insufficient tax has been deducted from the employee's remuneration and the Commissioners are of the opinion that the employee knew that this was done wilfully by the employer.

1784. Chairman: There cannot be circumstances in which the wretched employer has to pay twice over? - No. - (Mr. Smith): We would not make a direction solely for collection reasons; in other words we would not do it because the employer was bankrupt. There would have to be, for example, some form of collusion between the bankrupt and the employee. We would not use it as an alternative means of collecting money.

1785. Mr. Emerson: "Would not" or "could not"? - I think the answer is "would not".

1786. Chairman: I just want to get this clear. There is no limit in theory, is there, to the number of years you can go back? - None at all.

1787. That is what I thought. - (Mr. Blake): If tax is due. - (Mr. Smith): Subject to the tax having been assessed.

1788. Yes, of course, but given that the tax has been assessed there is no limit? - No.

1789. If that were cut down in any way would the result be that less credit would be given to taxpayers generally; turning the heat on sooner than you do at the moment? - I do not really think so. I think at the moment we turn the heat on as quickly as we properly can, and I would not say that we were dilatory about our follow-up although, of course, we err in particular cases, and would no doubt continue to do so if our preferences were cut down.

1790. Every now and then one sees cases where some ruffian has run up an extraordinarily large bill in taxes? - The difficulty there is not so much the enforcement of collection. It is usually ascertainment of the existence of the liability, and then it is determination. The important point is that we can never distinguish until a very late stage

between the potential bankrupt and the ordinary taxpayer who may be dilatory in a particular year, and we would not wish to apply the big stick to everybody.

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returns. We may pick them up by a side wind quite late; perhaps from a bank interest slip when they eventually put undisclosed takings into a bank instead of under the bed.

1804. Mr. Emerson: Referring to the back duty case, the penalty proposed would not be preferential, would it? - No, not in the ordinary back duty case with which I expect most of us round this table are familiar. There are, however, certain penalties known as penal duties which are in fact added to the amount of assessable tax, but these are rare.

1805. Chairman: There is another scheme which has been suggested, and which would be an alternative to the arrangement I have just suggested to you. In this scheme, after payment of preferential creditors other than yourselves, there would be a certain limited percentage, say 50 per cent. of the available surplus assets, which would go to Revenue, and the remainder would go to the general body of creditors. Some people have suggested that that would go to allay the existing dissatisfaction with the position to some extent. I do not know whether you would prefer a fixed percentage of the surplus assets to an average over the number of outstanding years? There are the two possible ways of doing it. - The object of this alternative is to give the other non-preferential creditors a look-in?

1806. Yes. - So that we do not swallow the whole estate.

1807. So that the whole of the cream of the milk is not taken off by the Inland Revenue. - Yes.

1808. Mr. Emerson: That could not apply to the payment of all the preferential creditors. - I was just about to ask that question. Would you lump together all the preferential creditors?

1809. Chairman: As I understand it, you would take the preferential creditors other than yourselves. - Wages, and so on.

1810. You would pay them off, then you see what the surplus is, and if the surplus is, say, £1,000, £500 goes to you and £500 goes to the general body of creditors, if you take 50 per cent. which is the suggested figure. - With a reasonably high figure - I must confess I think 50 per cent. sounds rather a severe restriction on our preference - with a higher percentage this proposal sounds less open to objection. It does give the other creditors the look-in you would wish them to have, and we do not swallow the whole estate.

1811. Mr. Emerson: That could result in unsecured creditors being paid in full and the Inland Revenue getting a dividend of about 5 per cent. or 10 per cent. - We presume the balance would apply as non-preferential.

1812. Chairman: I think if you had a preference, a 50 per cent. preference, and there was a balance, you would qualify for it. You would send in your proof with the rest of the creditors. - This involves two things, first of all the introduction of a sort of pre-preference for wages, salaries

1813. Mr. Emerson: Rates. - Would you say rates?

1814. Chairman: Rates would come in as preferential under that suggestion. - Would they be treated the same as taxes, or prior to taxes?

1815. Prior to taxes. - What about Purchase Tax?

1816. Everything except yourselves, which sounds rather harsh. - What about Pay As You Earn? - (Mr. Emerson): Everything in Section 33, except subsection (1).

1817. Chairman: The idea is to ensure that there is something in the bankruptcy for the general body of creditors. - Can we properly distinguish between taxes and rates, or between rates and wages?
1818. In most cases the bulk of the preferential debts consists of taxes which your Board administer. I do not think you generally get rates running up to such a figure as people allow their income tax to run to. The amount of the Revenue's claim is often unknown until the last moment, and it comes down like a bombshell. - The other preferential claims are not quite so small as you might imagine. We did look at some figures in Table 5 of the Board of Trade's report on bankruptcy, and I see rates and taxes take about two-thirds of the preference.
1819. You lump together rates and taxes? - That is what the table does. Rates and taxes take about two-thirds on the average of the number of estates of different sizes, and the other preferential creditors, excluding rates and taxes, take one-third, which is quite a substantial measure of what I would call pre-preference.
1820. Let us see how that works out. Taking it, roughly speaking, under the percentage scheme which we were discussing just now, about half of what is at present preferential would remain preferential in the full sense, and the other half would come into the first half of the surplus. That would leave, in cases where there were no assets at all, something to the general body of creditors to keep their interest alive. - What I am really wondering is why for that purpose you need distinguish between two different types of preferential creditor? So far as the non-preferential creditors are concerned they do not care whether it is rates or taxes.
1821. Mr. Emerson: It is only in respect of the assessed taxes that you have power to go back over past years? - Yes. For wages, of course, you are limited to the four months.
1822. Chairman: I gather, from what you said just now, on the whole you think that the suggested percentage basis would be preferable to the average which I suggested just now? - Yes. We would be sympathetic to the idea of giving the non-preferential creditors some interest.
1823. The idea of the percentage basis is that it ensures that they have some interest. They would not necessarily have any interest under the fractional scheme. - The percentage would ensure they had an interest. We would, however, look rather critically at the suggested rate. We would not wish the substance of preference to go down the drain. Any drastic reduction in preference would have quite an effect on the Exchequer yield from bankruptcy.
1824. I must say the only argument I can put forward in favour of the fractional idea against the percentage idea is that it does put a premium on detection, and you say that is a premium which is not something which would result from any merit in your offices because it very often comes to you by a side wind. - It can do.
1825. And by pure chance in some cases? - And we would naturally be unwilling to accelerate our process of assessment and collection against the good and bad alike in order to ensure a higher yield in bankruptcy.
1826. I do not know how far it would in practice be possible to accelerate any assessment. - I doubt if it would be possible to do very much in the generality of cases.
1827. Mr. Peirce: The thing that is going through my mind at the moment is I have known a case, or probably cases, where a trader has been up against having available capital, and he has procrastinated about his assessment with the Inland Revenue people for a long long time trying to use the money that should have been paid for tax in the hope of getting himself out of a mess, as a result of which he has got into a bigger mess than he would have been in if the Inland Revenue had pressed for their

money and agreed the assessment very much sooner. The fact that you have allowed him to procrastinate has led him to get in a worse position than he would otherwise have done. The net result is that you take your preference and you take all you can, leaving the poor creditors to take what's left. - (Mr. Price): I would make two comments on that. First of all the man has himself apparently been paying his other creditors while putting off the evil day of getting his tax liabilities agreed, and in that sense his trade creditors may well have got a sort of preference already over the Inland Revenue.

1828. Theoretically that may be so, but in practice it is quite the reverse. He gets himself into a bigger mess. - That may well be so, but we find it does happen the other way quite often. The second point which occurs to me is that it is not, generally speaking, the Revenue's fault. In fact, I should say that it is only in the small minority of cases that it is the Revenue's fault that agreement on assessments is delayed.

1829. Sometimes it is the accountant's fault, but that is by the way. - There are appeal procedures, which take time, and adjournment on appeals, where the Revenue are quite anxious to get on with agreeing the liability. When the case comes before a body of General Commissioners the accounts are still not produced, and the General Commissioners continue to give adjournments which may well mean that agreement is not reached for a long time after the Revenue would wish it to be.

1830. Chairman: Your point is that in a great number of cases, if not most, though there has been delay it is not attributable to the Inland Revenue at all? - I should think definitely so. - (Mr. Smith): This is to us an unusual and interesting slant on the problem. We do not get letters to Ministers from creditors criticising us for not bankrupting taxpayers quickly enough to save their money.

1831. Mr. Emerson: The original suggestion was to take your preference away altogether. I do not suppose you would agree to that? - We have said quite a lot about that in the written memorandum. We think it is not merely justified on historical grounds. We do think in the present day there is a special case for preference, and a very strong practical case, the one the Chairman himself put at the outset.

1832. Mr. Emerson: In the Pratt case, it was only in the Court of Appeal that you succeeded. You lost in the previous two Courts, so there must have been quite a weight of influence against you? - I do not think they questioned in the Courts that there should be some form of preference.

1833. In Re Pratt it was decided in the first instance that the Revenue's priority should be for taxes in the year preceding the receiving order, and this was upset in the Court of Appeal. - They did not question the giving of some preference.

1834. Chairman: There are other matters which you deal with in your memorandum. I suppose you have seen a document headed BIA/112 that is the latest form in which our ideas about discharge appear? - Yes.

1835. In referring to the discharge scheme, it is your opinion that subsequent to the public examination it should be open to the Official Receiver, trustee or a creditor to apply for caveat? - We were then commenting on the original scheme. B1 of BIA/112 meets the substance of our comment.

1836. I do not know how much importance you attach to the creditor being able to apply for a caveat. We thought he should not, on the whole. What we were afraid of was expense and trouble being caused by vindictive creditors, whereas if there is any substance in the matter which calls for the application for a caveat the creditor can always jog the Official Receiver, and ask him to get on with it. - We did, when we put in "creditor", foresee the possibility of a dispute between ourselves and the trustee, but on the whole we do not think the point is of

sufficient practical importance to press. What we had in mind was some similar right to the right which a creditor has under the Companies Act to restore a company to the register. The cases are not of course parallel but there is some analogy. Under the scheme the bankrupt has a sort of provisional discharge with two years to go - two years probation, as it were.

1837. I see you refer to the conduct of the bankrupt subsequent to the public examination, but, of course, as we envisage it, earlier conduct which had come to light after the public examination but did not come to light at the time of the public examination might be ground for applying for a caveat. I do not know whether you took that into account? - We would certainly agree with that.

1838. The next matter that you comment on is the question of monetary limits. We entirely agree with not putting up the £50 for a petitioning creditor's debt. I do not know whether there are any other of the monetary limits you would like to make any comments upon? - We had no other comment.

1839. As to Section 51, we have tried to tighten it up. It is a very difficult Section to tighten up. I do not know if you would like to look at our draft which, I think, goes pretty far towards meeting your point? - This is devised to cover the professional man?

1840. We were thinking particularly of music-hall artists, who are rather difficult to deal with under the existing Section. - (Mr. Blake): One wants to think about this a little carefully. The Courts are awkward on the words "salary" and "income".

1841. We thought "or other remuneration" would cover it pretty well. - That is the wording I am a little nervous about - "or other remuneration". I do not know whether that would be wide enough to meet the case which we have in mind, which is one which does not fall under P.A.Y.E. In the sphere of taxation "remuneration" would be an apt term for an employment under Schedule E, and would be covered therefore by the P.A.Y.E. scheme, but the earnings we have in mind are those which fall outside the P.A.Y.E. scheme, and that is why I am nervous of the word "remuneration".

1842. The word "remuneration" I know is in the sphere of tax law used in a rather narrow sense. We have looked at one or two dictionaries, as to the ordinary wide meaning of the word. I think we looked at Chambers, if I remember rightly. - Why not be quite general and say "reward for services"? Has that been considered as a possibility?

1843. "Reward for services"? - That is what we are interested in.

1844. Your trouble, if I may say so, is the narrow sense in which "remuneration" is used in your own sphere. - Perhaps I am unduly prejudiced by that, I agree.

1845. We were trying to cast our net as widely as we can. - (Mr. Smith): We took power on this year's Finance Act to get returns of payments made to actors, etc. There is a Section of the Act with power for the payer of the fee to give us information about the payments if we asked for a return. The phrase used there is "payments of any kind for services rendered".

1846. Mr. Emerson: What does your form P.35 say? "Any payments whatsoever", is it not, in excess of £12 a year? - The scope of that form is limited by defining the person to whom the money has been paid. Here you would need to limit the scope in some other way.

1847. Chairman: Can we get hold of your form that you serve on employers requiring them to give you information about payments? - It is being drafted. All it will do is quote the Section, Section 20 of the Finance Act, 1956. The wording of that Section might, I think, be helpful.

1848. As regards your point about Section 11 at the beginning of paragraph 15, I think "Section 11" is a mistake. Is it not Section 45 you have in mind? - (Mr. Blake): It is the combination of the two Sections,

1849. We thought of trying to solve the difficulty there by making the operative time under the first proviso to Section 45 the time of gazetting. We were going to make it the time of gazetting the receiving order, and not the time of actually making the order. If that were done it would meet your point? - (Mr. Smith): That entirely meets our point. It would, of course, presumably be necessary to have some similar amendment to Section 46?

1850. We are still awaiting, as far as I know, observations from the Treasury about inter-departmental set-off. Do you want to say anything about that, or do you want to leave it to the Treasury? - We would prefer to leave it to the Treasury who have, of course, consulted us.

1851. I do not know if you would like to commit yourselves to this? Do you think the system works equitably as it is at the moment, or not? - While we entirely sympathise with the Treasury views on this point - I do not think I am disclosing any secret when I say they will not favour any change - our interest in this is limited by the fact that there are not all that many cases. Where, however, a case does arise there is usually quite a substantial sum involved. It was particularly important to us towards the end of, and just after, the last war, when there were, of course, so many payments outstanding on Government contracts and also so much Excess Profits Tax outstanding. The right to set-off was then very valuable indeed, and I must say that in that particular field it seemed to me unquestionably right.

1852. As it was just after the war? - Yes, where further payments were due to be made by the Ministry of Supply and substantial Excess Profits Tax (at a rate of 100 per cent.) was outstanding. - (Mr. Price): It was indeed very often the profits on Government contracts which gave rise to the Excess Profits Tax.

1853. As regards Section 33(1)(a), you say no difficulty arises where it is slightly differently worded in the Companies Act. If there is no difficulty do you really want to make any alteration? - It was only our desire for tidiness.

1854. We note what you say about Section 42, and I think we shall have to think that over. Putting it very shortly, the point you make is there are a large number of transfers of property which would not be strictly settlements, gifts in cash, and so on. - (Mr. Blake): This point I noticed the other day is made by the authors of Williams on Bankruptcy, Sixteenth Edition, in their Preface (page viii) as one of the points which they note as needing reform since, as they put it, "the fortuitous circumstances of the debtor's death has deprived creditors of the right to attack transactions which would certainly have been set aside in the case of a living bankrupt".

1855. As regards your point about insolvent estates, we were going to recommend the Court should be given power to dispense with service, and I think that meets the case. The trouble at the moment is you cannot get a petition unless there is either an executor or administrator in the saddle. If you gave the Court power to dispense with the service of the petition altogether that, it seems to me, would get over the difficulty? - That was not the sole basis on which Morton J., in the case mentioned in the Board's memorandum, in *Re a Debtor* in 1939, refused to make an order where there had not been a grant of probate or of letters of administration. He refused it not merely on the ground that there was nobody to serve but because it was contrary to the intention of the Section that an order should be made until a legal personal representative had been constituted, and one of the grounds which the Judge relied on was that if the estate should ultimately prove to be solvent there would be nobody to whom the trustee could hand over the balance of the estate. That is why we suggested that, if an order is going to be able to be made without

a prior grant, the Section would have expressly to say that in some suitable words, and it would be necessary to go further than merely dispensing with service.

1856. We must look into that and see whether we need put in other words saying expressly that an order may be made. - Morton J. was referring to Rule 33 of the 1915 Bankruptcy Rules which talked about an order being made or dealt with the lodging of accounts, etc. when there was no personal representative, but that did not persuade him that an order could be made under Section 130. - I think it would with respect need an amendment expressed in firm and wide terms.

1857. The other Section you deal with is Section 140. You are proposing to introduce the words "or in Eire"? - It is a very small point, but it does cause us trouble in practice. We send a notice to be served by some agents in Dublin, and they send it back with an affidavit which has not been certified. A long argument results, and they say "This does not need to be certified, we are doing this every day".

1858. I think the words "or in Eire" at a suitable point will stop that excuse, will it not? - It is only necessary to make it clear that "out of the United Kingdom" does not include the Irish Republic.

1859. Unless there is anything more you would like to add I do not think we need take up any more of your valuable time. Thank you very much for coming.

(The witnesses withdrew)

Wednesday, 26th September, 1956

Present

HIS HONOUR JUDGE BLADEN (Chairman)
 MR. H. BEER, C.B.
 MR. C.B.M. EMERSON, F.C.A.
 MR. H.B. PEIRCE, O.B.E., J.P.
 MR. B.E.P. MACTAVISH
 MR. C. ROY WATERER, I.S.O. } Joint Secretaries

MEMORANDUM SUBMITTED BY THE
COMMISSIONERS OF CUSTOMS AND EXCISE

Introductory

1. The Commissioners are, subject to the general control of the Treasury, charged with the duty of collecting and accounting for, and otherwise managing, the revenues of Customs and Excise.
2. Generally speaking, the system of collection of the duties on imported goods (customs) and on home-produced goods and functions (excise) rests on physical control by Officers of Customs and Excise and is such that traders can obtain delivery of goods only after payment of duty, or subject to their giving bond to secure the duty. Consequently the provisions of the Bankruptcy Laws are of little concern to the Commissioners over this field of their responsibility.
3. The Purchase Tax, introduced in 1940, is however in a different position. This is a tax in respect of trading transactions payable by traders who are empowered to recoup themselves of the tax equivalent from their customers. As an equitable arrangement some period of credit for the tax has to be allowed to the trader responsible under the law for paying it in order that payment of the tax shall proceed in step with reasonable and general trade credit practice. Purchase Tax debts due to the Commissioners are therefore monies which have been, or ought to have been, collected by the debtors from their customers and are held by those debtors until they are required by law to be paid over to the Commissioners, usually one month after the end of the quarter in which the tax accrued due.
4. The major part of Purchase Tax is of course collected from corporate bodies but even so for several years past it has been necessary to petition for or prove in the bankruptcy of about 40 persons per year for the purpose of recovering tax debts. It is the Commissioners' practice not to resort to bankruptcy action unless it is quite clear to them that

- (i) such proceedings will be reasonably certain to result in the payment of the tax in whole or in part, and
- (ii) no other course such as consent to payment by instalments settled by mutual arrangement as being within the debtor's means, or postponement of payment during a period of temporary financial embarrassment, is reasonably likely to prove fruitful.

Furthermore, even in cases where tax debts and the resultant insolvency have arisen from fraudulent trading it is not the Commissioners' practice to institute bankruptcy proceedings as a punitive measure either additional to or in lieu of criminal proceedings in respect of the fraud.

(1) Discharge of bankrupts

The Commissioners agree generally with the scheme submitted in the appendix to the Committee's letter of 2nd November, 1955, save that, as regards the proposed provision for the automatic discharge of existing bankrupts on the inception of the scheme (paragraph (e)), the Commissioners consider that there ought to be an opportunity of picking out any specially bad cases among existing bankrupts; they therefore suggest that a period (say 12 months) should elapse after inception and before such discharge, during which a caveat may be lodged.

(2) Distribution of assets in successive bankruptcies

The effect of the present law is such that it is possible for a large deficit outstanding from an earlier bankruptcy, perhaps many years old, to blight the prospects of creditors in a second bankruptcy. It seems to the Commissioners that it would be more equitable to distribute current assets to current creditors because:-

- (i) The trustee and creditors in the earlier bankruptcy have had the opportunity, of which they presumably have not taken full advantage, of acquiring these assets, and should not reap the reward of later creditors' efforts; and
- (ii) In many cases the unpaid balance of the earlier debts will have been written off and forgotten, so that any further dividend would be in the nature of a windfall.

The Commissioners would accordingly support an amendment of the law in the sense envisaged in the Committee's letter.

If this proposal does not find favour, they would submit for consideration a less far reaching amendment of the existing law, viz. to provide that the creditors in the first bankruptcy should be entitled to receive only such further dividend (if any) as would be required to bring their total rate of dividend up to that received by the creditors in the second bankruptcy.

(3) Increase in monetary limits to take account of the fall in the value of money

The Commissioners consider that, although in principle it is desirable to increase the monetary limits of the Act by reference to the fall in the value of money since 1914, it would be unwise to apply the same proportionate increase to all the monetary limits, or, indeed, in certain cases, to apply any increase at all. They suggest that the various limits should be reviewed on their individual merits in the light of present circumstances and past experience. On this basis, they would make the following observations on the points specifically mentioned:-

(i) The petitioning creditor's debt

There would appear to be two principal considerations that make the imposition of a limit in this respect desirable: the necessity to avoid encumbering the Courts with a large number of small matters of trivial importance; and the undesirability of forcing a debtor into bankruptcy in respect of a relatively small debt.

As regards the first point, it seems to the Commissioners that £50 is not too small a figure, even in terms of present-day currency. Although the Commissioners do in fact normally initiate bankruptcy proceedings in the High Court, in accordance with the long-standing practice of Government Departments, the bulk of bankruptcy business is done in County Courts; and sums less than £50 are quite commonly at stake in County Court proceedings. Further, in petitions for winding up under the Companies Act taken in the High Court, the

Commissioners normally (although there is no statutory requirement) observe the same minimum, and have not been criticised for petitioning on too small a debt.

The Commissioners have reason to suppose that the existence of the limit is well known to certain debtors, who take advantage of it by keeping their indebtedness just below it. The Commissioners anticipate that their difficulties would be considerably increased if debtors were able to avoid bankruptcy by keeping their indebtedness limited to, say, £99 odd, instead of £49 odd as at present.

The possibility of combining with other debtors is appreciated, but the practical difficulties in the way of this procedure seem to the Commissioners so formidable as to render the provision almost useless.

(ii) Estimated value of assets to enable an order for summary administration to be obtained

The Commissioners would welcome a substantial increase in this limit. They are strongly in favour of any measures that would cheapen and expedite bankruptcy proceedings, and they see no reason for dissatisfaction with the simplified procedure of summary administration. They also have in mind the fact that the only information about the assets normally available at the material time is the debtor's own estimate of his statement of affairs, and that these estimates are commonly very optimistic. Having regard to this latter point, and to the fall in the value of money, the Commissioners suggest that the limit could reasonably be set at not less than £1,000.

(iii) Other monetary limits

Of these, the Commissioners would mention only the £20 limit on the value of tools, clothing and bedding retainable by the bankrupt for himself and his family. (* Section 38(2)). It is clear that this limit cannot be enforced in practice at present day values; they suggest that it would be preferable to substitute a limit taking into account both modern values and modern conceptions of the bare necessities of life, in the hope that the limit might be enforced; or, possibly, to allow the Official Receiver discretion in the matter.

(4) Limitation of vesting of after-acquired property to such as may be claimed by the trustee

Under section 38 "the property of the bankrupt divisible amongst the creditors" includes "all such property as may be acquired by him (the bankrupt) before his discharge, and under section 53 the bankrupt's property vests in the trustee as soon as he is adjudged bankrupt. There is no specific provision governing the time at which after-acquired property vests in the trustee, and there is no provision entitling a bankrupt to retain, as of right, any after-acquired property, though under section 58 the trustee may make him such allowance out of his property for the support of himself and his family as the trustee thinks fit. It would appear that, in theory, all income and other property acquired by the bankrupt during the continuance of the bankruptcy vests in the trustee, and should be handed over to him automatically, immediately upon acquisition. Nevertheless, it appears to be well established in practice that the bankrupt cannot be required to hand over such of his income as is necessary for the support of himself and his family. Indeed, the normal situation is that the bankrupt hands over nothing automatically, and it is only with considerable difficulty that he can be made to hand over any portion of his income at all. There is thus a wide divergence between theory, which is very stringent, and practice, which appears to the Commissioners to be unduly lenient.

* Sections etc. quoted without reference to some other Act are in all cases sections etc. of the Bankruptcy Act, 1914.

Accordingly, the Commissioners would welcome any amendment to the law designed to define, with a fair degree of accuracy, what the bankrupt may retain out of current income to support himself and his family, and to entitle him, without formality, to retain this amount; at the same time, they consider that there should be a substantial tightening up of the provisions designed to enforce the handing over of the surplus. They suggest that the bankrupt should be required, so long as he remains undischarged, to keep the trustee fully informed of his income, and to make such weekly or monthly payments as may be appropriate. The trustee should have power to verify the bankrupt's statements from any appropriate source, and those possessing the information should have the power, and, preferably, the duty, of disclosing it.

Any failure by the bankrupt should be punishable under the criminal law, and should also, under the proposed new procedure relating to discharge involve the entering of a caveat.

(5) The Official Receiver as trustee in non-summary cases.

In the Commissioners' view there would be a substantial saving in time and expense in many cases if it were possible for the Official Receiver to act as trustee in non-summary cases. Under section 239 of the Companies Act, 1948, the Official Receiver is automatically liquidator if no other appointment is made by the Court (which normally follows the creditors' wishes in this respect), and bankruptcy procedure would be brought more into line with companies winding-up procedure if there were provision for the Official Receiver to act as trustee automatically unless the creditors desire the contrary.

(6) Provisions regarding conclusion of bankruptcy when the debts are paid in full.

This event is very rare in the Commissioners' experience, and they do not think that they can usefully offer any observations on this point.

(7) Provision to enforce payment out of earnings.

A most important part of the tightening up envisaged under (4) above would be the extension of the provisions to enforce payment out of earnings to all classes of employee. The Commissioners see no reason, in present circumstances, for the specially rigorous treatment of benefited clergymen, officers of H.M. Forces, and civil servants.

In fairness to bankrupts who are prepared to co-operate, and particularly those who might be prejudiced by an employer's knowledge of the bankruptcy, full opportunity of making voluntary payments should be allowed.

(8) Institution of all prosecutions by the Board of Trade in lieu of the Director of Public Prosecutions.

This is primarily a matter for the Departments concerned, and the Commissioners have no observations on the subject.

(9) Deeds of Arrangement.

The Commissioners have only a limited experience of this type of case, the more especially as they find that, owing to their rights of preference, they receive full payment in the great majority of deed of arrangement cases. So far they have found no cause for dissatisfaction with the existing law on the control of assets.

Other Matters

The Commissioners desire to offer suggestions on the following further points:-

(a) Section 20(8) - Vacancy on committee of inspection.

The present law requires the summoning of a meeting of creditors to fill a vacancy on the committee of inspection as soon as a vacancy occurs. The summoning of such a meeting is often quite expensive, and, in the Commissioners' view, it is frequently an unwarranted drain on the assets, especially in the later stages of a bankruptcy when it may be almost impossible to persuade creditors to attend. Nowadays, when the great majority of businesses are run by limited companies, the great majority of members of committees of inspection are representatives rather than creditors in person. Naturally, when a creditor is a public body of any kind, service on a committee would also be by a representative. The Commissioners see no valid reason why a creditor that appointed a representative to the original committee should not appoint a substitute representative when occasion arises. In the case of a creditor serving personally, there could be provision for co-option, or leaving a vacancy unfilled. These relaxed arrangements could be subjected to the supervision of the Board of Trade.

(b) Section 33(1) - Provisions relating to preferential debts.

Preferential status for Purchase Tax was introduced by Section 20 of the Finance Act, 1942, which had separate sub-sections relating to bankruptcy and death insolvent, and companies winding-up. When the law relating to companies was consolidated and amended by the Companies Act, 1948, the provision making the tax preferential in companies winding-up was written into the section (319) which lists the other preferential debts, and the appropriate portion of the Finance Act, 1942, was repealed. For the sake of consistency, clarity and codification, the Commissioners suggest that, if a new Bankruptcy Act is passed, a similar procedure should be adopted. No change in the effect of the law on this point is suggested.

(c) Section 44(1) - Fraudulent preference.

The law relating to fraudulent preference is a subject of considerable difficulty, and, since the bankruptcy provision is applied to company law by section 320(1) of the Companies Act, 1948, any amendment would have a wide impact. Nevertheless, the Commissioners feel bound to suggest that the existing law, as established by numerous judicial decisions, is unsatisfactory. Indeed, the difficulties in the way of a trustee or creditor seeking to establish a case of fraudulent preference appear to be such that the law on the subject is largely non-effective. Without making any detailed positive proposals they suggest that the Committee should consider whether the plaintiff's burden in such cases could be lightened.

(d) Section 56 - Trustee's powers of compromise and arrangement.

Although they have not experienced any difficulty on the point in practice, the Commissioners note that there appears to be sufficient power for the trustee to act to the detriment of preferential creditors: e.g. under subsection (9) it might be possible to make a distribution of property in kind that ignored preference; and under subsection (7), to make a compromise to the advantage of a creditor whose claim, if allowed, would be non-effective or only partly effective because of another's preference. The Commissioners suggest that some safeguarding words might be inserted.

(e) Section 77(1) - Power to appoint joint trustees.

The appointment of joint trustees appears to the Commissioners to be extravagant and unnecessary save in the most exceptional circumstances. Such appointments seem to arise more frequently from a compromise, when opinions are nearly equally divided between two choices of trustee, than because the volume of work is expected

to be beyond one man's capacity. They understand that in windings-up by the Court under the Companies Act, the appointment of joint liquidators is not generally viewed with favour by the Court. They therefore suggest that some restriction should be placed on the power to appoint joint trustees; e.g. it might be made a requirement that the Board of Trade or the Court should be satisfied of the advisability of such appointment.

(f) Section 151 - Provisions that bind the Crown.

The Commissioners have had some difficulty in determining whether this section applies to section 37 as "a provision relating to the remedies against the property of a debtor" or as "a provision relating to the priorities of debts", or at all. This is a matter of some importance when a debtor makes part payments while bankruptcy proceedings are pending. This point has not so far, to the Commissioners' knowledge, been brought before the Courts.

(g) Second schedule, paragraph 24 - Expunging of proofs.

The existing provisions are designed chiefly to enable a trustee to wipe out a proof of debt against a creditor's will, if, after once accepting it, he decides after all that it is not acceptable. Some trustees take the view that this provision applies to amendments agreed between the trustee and the creditor in question. An application to Court seems quite unnecessary for the rectification of simple errors or omissions, especially if the amendment is a reduction agreed to by the creditor. The Commissioners suggest that some provision to clarify and regularise the position might conveniently be inserted into the Schedule.

King's Bean House,
Mark Lane,
London, E.C.3.

28th May 1956.

EXAMINATION OF WITNESSES

Mr. George Imms	} representing Commissioners of Customs and Excise
Mr. James Norman Balliol Laine	
Mr. Edward James Piper	

Called and examined

1860. Chairman: Gentlemen, I do not know if you have any idea, as a matter of historical interest, why purchase tax was saddled on you in particular. - (Mr. Imms): That is a long story. It is true that the tax is quite a lot different in some ways from Customs and Excise duties, but in other ways it is very similar, particularly on imports where it virtually operates as a supplementary Customs duty over and above the ordinary one.

1861. As I understand it, it is rather similar to P.A.Y.E., in that the vendor of the goods is really acting as the unpaid collector of the tax? - So he often tells us. But this feature is common to all indirect taxes.

1862. What he ought to do then, ideally, is to pay every penny piece of purchase tax to a separate account? - Many traders do. They have a number 2 account into which they pay purchase tax monies and have no difficulty whatever in paying their purchase tax at the end of the quarter.

1863. I suppose that if a man goes bankrupt and you find his purchase tax account in credit you would be paid in full, would you not - it is trust money? - I am afraid it is not actually trust money. The Committee might like to know a little more about the background. The traders accountable are the registered or registrable traders. Some who ought to be registered do not apply for registration. The registrable traders are the manufacturers of chargeable goods and the wholesalers of chargeable goods whose gross takings exceed £500 a year from their sale of chargeable goods. In the case of wholesalers, the Commissioners have power to dispense with registration and they do in fact make quite extensive use of that power. For a long time they used it almost to the extent of not registering new wholesalers but that policy has been relaxed over the last couple of years and we do now consider registering new wholesalers. But the traders we are most concerned with here are manufacturers and there of course we must register them. If they are making and selling chargeable goods then we have to get our hands on them to get the tax on the goods.

1864. Mr. Emerson: The manufacturer collects purchase tax from the wholesaler? - If the wholesaler is registered no tax passes between the two. The registered trader can buy goods from another registered trader without paying tax.

1865. Chairman: In that case you collect from the wholesalers? - From the last registered trader. The registered traders are inside a "ring fence" and it is when the goods pass across the ring fence that they become chargeable. That is not entirely true; tax is chargeable if the man appropriates goods to his own business. The maker of furniture who took a suite home would be chargeable with tax on that.

1866. Or a company which manufactures furniture and puts one of its own tables into the board room? - Yes, that type of thing, but generally speaking the ring fence is a fair analogy.

1867. Mr. Emerson: Tax could also fall on a retailer. - A manufacturing retailer?

1868. No, a milliner. - The manufacturing retailer, yes.

1869. Mr. Peirce: Only if he is registered? - Yes. There are about 63,000 registered traders at the moment. The figure fluctuates but I think that for the last five years it has been somewhere between 60,000 and 70,000.

1870. Mr. Beer: Do you know how many are private traders as distinct from companies? - I do not.

1871. A small proportion? - Numerically I should imagine a large proportion; they would be small people. So far as amount of tax is concerned, the number of people who pay the greater part of the tax is the smaller proportion of the 63,000, I think.

1872. Of course there are a lot of merchants who are sole traders? - Yes, and lots of small manufacturers in trades like fancy goods. You only need a few rubber moulds and plaster of paris and you can set up as a fancy goods manufacturer. The estimate of the tax for this year is £510 million.

1873. Chairman: And you have got priority in bankruptcy to the extent of twelve months before the receiving order under the 1942 Finance Act? - That is right.

1874. Do you think that is adequate or would you like to see a larger priority? - No, I think it is adequate. - (Mr. Piper): It is quite reasonable. We do have regard to the expiry of preference of course when it comes to a matter of whether we shall give a man a further extension of time, and I think that by and large twelve months is quite reasonable.

1875. I do not know if there is any more you want to tell us about purchase tax, which is your peculiar concern, before we go on to bankruptcy generally. - I do not think so, unless the Committee has some point.
1876. Mr. Emerson: I am wondering why preference for purchase tax cannot be reduced to six months. It is accountable quarterly. You have a month thereafter for them to get their accounts out and then a further month to collect it. - No, tax is due one month after the end of the quarter.
1877. That is four months. Then you would get two months margin? - I think six months would be inadequate for this reason, that so many trades of course are seasonal and we might give a man rope in his off-season in his hope, and ours, that he would pick up in the season. But it may happen that he has a bad off-season and follows it up by a bad season and nine months have gone. We do not like to be too hard.
1878. Chairman: On the other hand, if the proper thing for the taxpayer to do is to pay the amount of tax into a separate account, there is no particular reason for giving him any rope, is there? - I think that is rather a policy of idealism. We do not expect a man to have a second account. We know as a matter of fact that a large number of prudent traders do it that way because it suits them but I would not like to say we could press them to do it that way. It obviates the tendency to use tax in the business which is the excuse they so often give.
1879. Now may we go into more general matters? Have you seen a document headed "HLA/112" dealing with discharges, which came out since your memorandum was written? - Yes.
1880. You will see from that we were proposing in the case of an existing bankrupt to allow a period of two years during which a caveat might be applied for. That is rather better from the creditors' point of view than the twelve months you suggest? - Yes, we have no objection to that.
1881. Having had a chance of looking at HLA/112, do you think it meets your point as regards discharges? - Yes.
1882. As regards subsequent bankruptcies, I see your first preference, so to speak, is in favour of very much the same scheme we had envisaged; the creditors in bankruptcy number 2 get the first out of the cold joint before the people who already had a helping out of the joint when it was passed? - Yes.
1883. Your alternative scheme interests us very much. I want to see if I understand it. As I follow it, it amounts to this, that if the creditors in bankruptcy number 1 have had X shillings in the pound, then the assets in bankruptcy number 2 are to be applied first in paying X shillings in the pound to creditors in bankruptcy number 2, and thereafter in paying an equal number of shillings in the pound to each. - Yes, to all. It is a sort of consolidation, as it were, of the two bankruptcies.
1884. We must think about that. It seems to me to have a great deal to recommend it. Do you really prefer the scheme we had originally proposed to this, one might almost say, financial judgment of Solomon. Which you propose? - I do not think we have any really strong feelings. We might be creditors in the first or second bankruptcy. We might be caught either way.
1885. It is really a question of which strikes one as being the fairest? - Yes. I think the two points we made in our note are in favour of the Committee's scheme - that the first bankruptcy is something which is over, as it were, and there is a case for leaving it as closed.
1886. There would not be many cases in fact in which the people in bankruptcy number 2 would be likely to get as much as two shillings in the pound while the other people were not getting anything? - No.

1887. As regards monetary limits, I think there is an obvious slip in the typing of your memorandum, in the third line from the bottom of the page: "The possibility of combining with other debtors" - it must be "creditors"? - Yes.

1888. I see you do not want to increase the £50, and there we are in agreement with you. Oddly enough, £1,000 as regards the ceiling for summary administration was just the figure we were toying with and a good many witnesses seem to support it. We had a lot of difficulty about the £20, tools of trade, clothing and bedding. Obviously in these days £20 goes absolutely nowhere; it is a ridiculous figure as it stands and we were toying with the idea of recommending the abolition of a limit there and leaving it to the discretion of the Official Receiver, subject to the limitation that what he leaves must be necessary. Do you not think there is a good deal to be said for that because what is necessary for a bachelor, especially if he has no family, is nothing to what is required by a married man with a lot of children? - Yes, that was our view, that the realistic thing was to leave it to someone, to the Official Receiver.

1889. There is no point in putting in a figure which might be quite illusory? - No. One fears that whatever figure was put in, in turn might become out of date. One hopes it would not.

1890. One hopes the inflationary spiral will stop somewhere but one cannot see any indication at the moment. Are there any other monetary limits you want to offer any suggestions about? - I do not think we had thought of any others.

1891. There is the one that makes a man liable to arrest if he moves property worth, I think it is £5. That is absurd of course nowadays. We thought of trying to get over that difficulty by preventing him from moving, without the consent of the Official Receiver, property which would be divisible amongst his creditors. He could move anything he likes which he would be allowed to keep any way, but nothing of trust property, even of the smallest value. I think that is the fairest way, do you not? - Yes.

1892. That brings us to the very vexed question of after-acquired property. It seems to us the broad difficulties there are these: firstly that the bankrupt has got to live - if it is a man and you take it all away, you drive him into burglary, or if a woman, you drive her into prostitution; secondly, that if what one might call capital assets are vested in the trustee they may include things like white elephants and the trustee may be saddled with the duty of feeding the brute when he does not want it. Thirdly we have to make things in some way better for the caveated bankrupt than the uncaveated bankrupt. The three solutions, or attempted solutions we thought of were, firstly that there should be no automatic vesting of after-acquired property in the trustee; secondly, that the bankrupt should be under some sort of duty to disclose his after-acquired property, possibly subject to a monetary limit of some kind downward; and thirdly, the largest possible enlargement of Section 51 powers. I do not know if these are the lines you think it would be best to take, or if there are any others you would suggest? - We were thinking very much on those lines.

1893. You suggest, I see, that failure to disclose after-acquired property should be dealt with criminally. We were proposing to deal with breaches of any duty imposed to disclose after-acquired property by treating it as a contempt, which has some advantages; it could be dealt with more expeditiously, more summarily by the Bankruptcy Court. On the whole you think that is an improvement, do you? - (Mr. Laine): I think so.

1894. There has been an awful muddle in the past about the Official Receiver acting as trustee in non-summary cases. He does so at the moment simply because the Board of Trade wink the other eye and do not appoint somebody else as the Act says they must. We thought the proper

way to regularise the position was to substitute the word "may" for "shall" at the relevant point in the Section. So, if the creditors do not elect anybody, the Board of Trade may leave the Official Receiver in the saddle. That really regularises what is in fact done at the moment. (Mr. Innes): That would meet our point.

1895. I do not know if you can help us at all over the point you deal with in No. 6 of your observations. It is a question whether the Court should be obliged to annul an adjudication where debts are paid in full, or whether it should be only permissive to do so and is really a point where ethics and expediency come into conflict. As at present advised, we were strongly tending to the view that expediency should prevail. That means that the man has some real inducement to pay twenty shillings in the pound, if he gets the annulment by doing it. - (Mr. Piper): We have never come across a case where anybody has paid twenty shillings, or offered to do so. - (Mr. Innes): We have been in the field since 1942.

1896. It is generally in very old cases you get this. Do you think that expediency rather than ethics should prevail in this connection? - I think the bait to get the annulment is of some worth.

1897. Creditors generally, I think, would rather get their pound of flesh than have the man strung up as a warning to other defaulters. After all annulment and payment in full would not preclude prosecution if he had committed a criminal offence? - No.

1898. Has it been your experience that beneficed clergymen and officers of the armed forces and civil servants are treated particularly severely under Section 51? - I do not think we have ever had any to deal with.

1899. The only reason why they are very often shot at under that Section is because their salaries are definitely ascertainable? - They are an easy target, yes.

1900. I had not come across any experience of harsh treatment of persons myself because there is so little to get out of them anyhow. You are unlikely to be particularly interested in the bankruptcy of persons? - No.

1901. I see you are not particularly interested in the question of prosecutions or deeds of arrangement. - No, we have very little to do with them.

1902. I can assure you we have given extremely careful consideration to the fraudulent preference Section, in fact we have been sweating blood over it for a long time. One thing we had thought of doing on which we would be grateful for your views is this: we thought of introducing a clause providing that for some short period, say 21 days before the receiving order, any payment which in fact resulted in a preference could be set aside, no matter whether there was an intent to prefer or not. We think there would have to be some exception in the case of payments for a present or future consideration or something of that kind, but subject to that, and to that very narrow exception, all payments in the last 21 days would be voidable whatever the intent of the payer. Do you think that would be a good idea or not? - (Mr. Piper): It might be a quarter's purchase tax and have to go back in the kitty. - (Mr. Innes): It might work rather unevenly because of course 21 days from our point of view might be significant in one case and not in another. If he just happened to have paid purchase tax in that 21 days, back it goes into the kitty. - (Mr. Piper): And then it would tend to determine the date of a petition. If there had been a payment of purchase tax known to any creditor it would pay him to put a petition on quickly rather than wait for 21 days.

1903. Of course he has to have his act of bankruptcy, but he can force an act of bankruptcy by a bankruptcy notice within the 21 days as the

time at present stands. He could then put the petition on, which would have the result of making you refund the purchase tax anyway? - Yes.

1904. On the other hand you stand to gain as creditors on that point, by setting aside other payments. I do not know what you think of the idea on balance. - (Mr. Emerson): I should have thought in practice you are the last ones out of the hat to get paid. - We are.

1905. Chairman: As your preference goes back a year it would be as broad as it is long? - (Mr. Innes): I think we would stand to gain more than to lose, probably.

1906. But the answer is that you would on the whole like the idea, provided we either preserve intact your present right of preference, or at any rate preserve it at longer than three weeks? I think if we were preserving it at all it would be longer than three weeks. - I trust so.

1907. I was a little puzzled myself by what you say about the trustee's power of compromise and arrangement. He has got to get the sanction of the committee of inspection, has he not, or if he has not got one, the sanction of the Board of Trade? - Yes, it is Section 56(8). The committee of inspection probably does not include us.

1908. Do you not usually find yourselves on the committee of inspection? - (Mr. Piper): Not invariably; quite frequently but not invariably.

1909. You have no right to expect to be invariably on the committee, have you? - (Mr. Innes): No. We were thinking of cases where the committee did not include us, and there are such cases, and they authorise the trustee to make some arrangement which did not take account of preference.

1910. He has got to pay the preferential creditors first. - We were not thinking of preference there but the instance of the distribution of property in kind.

1911. Can you give us a concrete illustration of a case in which you have been unfairly treated through distribution in kind, or something of that sort? - (Mr. Piper): The sort of thing that does happen is where a motor car has been used in the business and then is passed on to somebody else for what is regarded as its market value but for what we regard as much less than the real value of the car.

1912. I think I am beginning to see the point. You suppose someone who is liable to pay purchase tax to you goes bankrupt, then the trustee settles with some other creditor by passing on to him goods on which purchase tax would be payable? - (Mr. Innes): Yes, stock in trade possibly.

1913. Thus dodging the purchase tax? - No, not dodging the purchase tax, but not recovering sufficient of the assets of the bankrupt that the trustee should if the proper value were paid for the goods that have been distributed.

1914. If something of the kind takes place, have you not your remedy under Section 80? You can always go to the Court if you are aggrieved by an action of the trustee? - Yes, we can go to the Court.

1915. I suppose it is possible that a majority of creditors might act unfairly against a minority, might they not, but then you go to the Court under Section 80? - Naturally enough, with the preference as it stands, we are not very popular with ordinary creditors in a lot of cases and they might have more regard to their own interests than to ours. They might support a trustee in something we thought was a bit out of line.

1916. Mr. Emerson: I have still not followed the case of the car where the trustees are acting against the directions of Section 33 on the distribution of assets. - (Mr. Piper): It comes down to a question of

value, and what is the value of the car, and you can get half a dozen people all putting different values on a car. We believe a car passed on to somebody else is worth considerably more than has been accepted.

1917. Chairman: I do not think it is really practicable to legislate for such very exceptional cases. I think we shall have to leave it that way with Section 80, will we not? - Yes, I think that is it.

1918. As regards Section 37, if we recommended any legislation about it, I think you would prefer, would you not, legislation which would make it clear that Section 37 did not bind the Crown? - (Mr. Innes): Yes.

1919. But, as you say, there is no decision on the point and perhaps we ought to clarify it? - We had one or two trustees who discovered that some payment on account of tax was made and they required us to give it up. It has not arisen on any great amount and, rather than have a protracted squabble with a trustee, we have done so, but a case might arise where the sum was substantial.

1920. In most cases I suppose when you get payment on account of purchase tax and bankruptcy supervenes, it is the exception for you to have any notice of an act of bankruptcy? - Yes. There is the man who probably has made some commitment with us as to instalments, and it is the last instalment perhaps.

1921. More often than not then you are protected under the existing law, even assuming Section 37 binds the Crown, since the payment is before the actual date of the receiving order and without notice of bankruptcy? - Yes.

1922. We were proposing an amendment which would give you still better protection, namely instead of before date of receiving order, it should be before date of gazetting the receiving order. - That would help us.

1923. The last point you mention is really rather a small one as regards procedure, is it not? - Yes.

1924. I do not know what my colleagues think but it seemed to me, as the proof is on the Court files, some sort of application will have to be made to the Court to amend it, but we can put in something to the effect that the Court shall amend the proof on the written consent of the trustee and creditor without any formal application. - That would meet the case.

1925. Gentlemen, I have nothing else to ask you. Unless you want to tell us anything more we need not take up more of your valuable time. - There is one point we did not deal with in our memorandum, the subject of preference, but I would like to go on record that we do associate ourselves with the Inland Revenue in defence of the Crown preference.

1926. I did not ask you but I assumed you did agree. - Yes, we are in full agreement.

1927. Thank you very much.

(The witnesses withdrew)

LETTER RECEIVED FROM
THE GENERAL COUNCIL,
TRADES UNION CONGRESS

Trades Union Congress,
Transport House,
Smith Square,
London, S.W.1.

26th January, 1956.

Mr. B. Macflavish,
Joint Secretary,
Bankruptcy Law Amendment Committee,

Dear Mr. Macflavish,

Bankruptcy Law Amendment Committee

I am writing with further reference to your letter of 2nd November 1955, drawing our attention to the appointment of the Bankruptcy Law Amendment Committee and inviting the views of the General Council on questions involved in its terms of reference.

Of the particular matters set out in paragraph 3 of your letter the General Council wish to comment upon No. 7, on the enlargement of the provisions of section 51 of the Bankruptcy Act 1914, to cover all kinds of earnings including the wages of workmen. The General Council agree that the differentiation in this respect between wages and "salary or income" is illogical, and that it leads to anomalies. They do not consider, therefore, that there could be any objection to the enlargement of the provisions of section 51 to include the wages of workmen,

There is one other matter which the General Council wish to draw to the attention of your Committee. At present section 33(1) of the Bankruptcy Act 1914, as amended by subsequent legislation, gives priority of payment to the following debts out of the bankrupt's property: rates and taxes, wages and salaries (including holiday or sick payments), and national insurance contributions. Representations have been received from affiliated unions reporting serious hardship to their members in cases where a bankrupt employer has been liable for common law damages to an employee and has not insured himself against this liability. The General Council accordingly wish to recommend that section 33(1) of the Bankruptcy Act 1914 should be amended to add an employers' common law liability to employees to the list of priority claims on assets.

The General Council will be glad to give oral evidence in support of these submissions if your Committee consider it necessary.

Yours sincerely,

(Sgd.) Vincent Tewson
General Secretary.

EXAMINATION OF WITNESSES

Mr. Charles John Geddes, C.B.E.	} Representing the Trades Union Congress
Mr. Arthur Leslie Noel Douglas Houghton, M.P.	
Mr. Lionel Murray	
Mr. Fred Jones	

Called and examined

1928. Chairman: I am afraid there is very little that you are interested in, that we are concerned with, and vice versa. - (Mr. Geddes): I think that is true.

1929. But we are pleased to note that you do not disapprove of our ideas about Section 51 on the attachability in bankruptcy of wages of workmen. - That is so.

1930. I think what might interest you is this. A suggestion has been made to us - we have not come to any decision about it yet - that the trustee in a bankruptcy should be empowered to pay wages of workmen, clerks, servants and the like, up to a limit of, say, £25 a head in respect of services rendered in the last week before the receiving order, and to pay it straight away out of any assets there are. We were not unsympathetic to the idea, but can you give us any sort of notion as to how much real hardship is caused to workmen and labourers under the present system, in which they are frequently kept waiting for quite an appreciable time before their preferential wages can be paid? - It is very difficult to produce, as it were, evidence of that kind out of a hat. If you say to us, "Can you produce evidence to show where hardship has existed?" I think we would have to say, "Give us notice of that question, and we will make enquiries".

1931. I can understand that. - We could, in respect of some things, get a certain amount of evidence, but I think it would be very difficult for anyone here to say about that. I do not know whether the office have got any evidence.

1932. Mr. Emerson: Most of that evidence would come from the branch representatives? - The evidence would be from the unions themselves, and the only way we could ascertain it would be to send the usual sort of circular out, saying, "Have you any evidence to this effect?" and that might produce it. Possibly Mr. Jones can make a further comment on this. - (Mr. Jones): I think given notice we could produce cases where there unquestionably has been a great deal of delay. We have been in touch with people in our unions, who deal specifically with cases of bankruptcy where there are claims for arrears of wages, and they tell us that in the majority of cases several months elapse before settlement. If you say, "Does that cause hardship?", if you mean does it cause hardship in the sense that the workman will starve, because he does not get the arrears of wages, that, of course, is not likely. We have National Assistance, unemployment pay, and so on, but there is, in fact, definite inconvenience which in cases does border on real hardship, in the sense that a man has to leave work because of bankruptcy, and he does not get any wages for that week, and does not get any unemployment pay to cover the arrears of his wages. In that sense, there is certainly relative hardship, and I think, given notice, we could produce such cases.

1933. Chairman: If you feel that you would like to look into that, and let the Secretaries have in writing any evidence you find, we would be very interested. - (Mr. Geddes): I think we can do that. Obviously, relative hardship is the right term. I would have thought it was fairly clear that if a man has been expecting to draw his wages at the end of the week, and suddenly finds he does not, there are two types of hardship; one, he has got to go home and tell his wife, which I would have thought was a hardship, anyway, and the other one is that he has got to find ways and means of getting something to tide him over, and in the majority of cases I would not have thought he had the wherewithal to overcome that initial difficulty. So there is relative hardship.

1934. But if he was right up against it, he would get something out of the Public Assistance, to pay for his Sunday dinner, would he not? - That is what Mr. Jones says, but, again, he may have been getting £10 a week and Public Assistance will not give him anything like that, so that hardship is still there.

1935. In spite of Public Assistance? - Yes.

1936. I was only speaking of the suggestion of a pre-preferential payment of one week's wages. We were not proposing to alter the existing preference. Sooner or later, he will get all his arrears, in most cases, paid in full. - We understand that.
1937. Of course, at the moment I suppose in most cases he has no difficulty in getting other employment within, say, a week or so? - In present circumstances.
1938. But we do not know how long full employment is going to last? - Unfortunately, no. - (Mr. Murray): Then, of course, there is the additional point that he may not necessarily get suitable alternative employment. He could probably go and get another job, but he may require a little time, if he is a skilled craftsman, to look around and find a job which suits him for long term purposes, even in conditions of full employment.
1939. That certainly wants to be borne in mind, I agree. The other point that you wanted to make about creating a new class of preferential payment, as I understand it, is as regards employers' common law liability, where the employer has not insured himself? - (Mr. Geddes): Yes.
1940. And I understand you are talking about cases where the employer has failed to provide safe conditions of working, or proper equipment, or something of that kind? - In other words, there is an industrial injury, but the industrial injury can be readily ascribed to negligence in common law, and a claim lies in common law, as well as under the Industrial Injuries Act.
1941. And a claim for an unlimited amount, as against a limited one? - Quite.
1942. I do not think any of us are unsympathetic to the suggestion, but I would be right in saying the difference in hardship, in the case of the workman who has been injured, as against the case of the ordinary trade creditor, is a difference only of degree, is it not? - Yes, but I should have thought it was a very important difference of degree. But it is awfully difficult to describe this in precise terms. Presumably, if a creditor is entirely dependent upon having his claim satisfied to continue his business, then the hardship on him is very great indeed, but if the workman is totally incapacitated, for example, and has a claim for a considerable sum of money, that sum of money is really the whole of his future life. If he does not get that his future is completely ruined, and it does seem to us that on that basis this is a very important liability of the employer. If it is a question of £300 or £400, for the loss of a finger, that might not be so much, but it might be a claim for £5,000.
1943. Or any amount? - Or any amount related to total incapacity, and that hardship is very, very considerable indeed.
1944. Yes, but that workman suffers more than the ordinary creditor simply because he can least afford to lose the money? - And because of the effect the loss of the money has upon the whole of his future life, if it is a question of total incapacity. The average creditor, one would have thought, could recover from the loss, sooner or later. The totally incapacitated workman cannot recover from that loss. If he does not get the money he cannot in any way safeguard his future as the law intends he should, by the award of adequate damages. - (Mr. Houghton): There is another point, if I may say so, that with the trade creditor there was an element of voluntary action. He did, after all, give credit, but the injured workman suffered as a result of the negligence of his employer, and he had no protection. In any case, it may be the supreme crisis in the life of an injured worker, whereas a trade debt, although I know it may in some cases spell the ruin of an individual's business.....
1945. It may indeed. - But I think we attach more importance to the claim resting on physical injury, than we do upon the claim resting upon normal trade transactions.

1946. In other words, what you stress is the physical nature of the injury, rather than the position of the person who suffers it. You are not seeking to create one law for the rich, and another for the poor, but one for the physically injured and the other who is only hurt in his pocket? - On the whole, the person who has any substantial claim for damages, if he is awarded those damages by the Court, must have suffered some quite serious injury. - (Mr. Geddes): I think an additional point is the consequential effect of the failure to recover damages upon an injured workman, as against the ordinary creditor. I do not deny for a moment that the ordinary creditor might suffer quite seriously, but the chances of his recovery, it seems to us, anyway, are very considerably greater than the case of the badly injured workman. The workman cannot recover physically, and he does not therefore get the compensation for the loss of livelihood. That is the factor.

1947. Mr. Emerson: Would you suggest, then, that where an uninsured motorist knocks somebody down, has substantial damages awarded against him and goes bankrupt, that should be a preferential claim under bankruptcy? - The answer to that is yes. - (Mr. Houghton): You raise a point now which I think does concern us greatly, and that is that making appropriate provision in the Bankruptcy Acts is not really the answer to this particular problem. It may not be within your terms of reference but, after all, what have we done about the motorist? We have put a statutory obligation upon him to be insured against third party risks. There is no such statutory obligation resting upon the employer.

1948. Chairman: As regards common law liability? - As regards common law liability.

1949. That is perfectly true. - And we, I think, would feel that perhaps that is where the remedy would really lie, but as I say that is probably not a matter for you.

1950. I do not think it is a matter which we really can deal with, but I agree with you that that may be the real long-term solution to the problem. - (Mr. Murray): But it might be pointed out that in fact the General Council have sought this particular remedy in the past from the Government, and the Government have not acceded to that suggestion. I fully agree that is a better solution, but we cannot count on that as a possible solution.

1951. It is outside our terms of reference. - (Mr. Geddes): But would it not be possible for the Committee to make a reference to it, as against a recommendation thereon?

1952. We could slip something in about it. Has any union tried to insure itself against this risk with Lloyds? - I am not sure. I would not think that was so, but we do not know.

1953. I fancy it could be done at some premium, but I do not know what premium they would charge. - But if you insure your members, as a union, against negligence on the part of the employer you relieve the employer of what is a moral obligation.

1954. If the workman is injured in such a manner as to suffer damage of the kind we all have in mind, the union would normally finance his action against the employer, would it not? - Yes.

1955. It seems to me a possible solution would be for the unions to arrange to indemnify their members in cases where the employer fails, or in other words goes bankrupt, and to recoup themselves against any loss they might suffer in consequence by means of a Lloyds' policy. - The only answer I would give to that, is that I am not sure, myself, that that is a liability, a function, or a responsibility of the trade union. After all, the trade union exists, certainly to protect its members in every way it possibly can, but not to protect the employer against his moral, rightful, and legal obligations.

1956. But you would not be protecting the employer? - If we did that, the employer would say, "This is all right. I have not got to worry about this at all. This man is insured by his trade union", and you relieve him of the moral responsibility of this.
1957. But supposing you took up the line I am suggesting, and you financed the workman's action against his employer. The employer says, "I do not care. I am not going to pay. The union will pay the damages". Then, you serve a bankruptcy notice on the employer, you make the employer bankrupt, and you drain him of his last drop of blood, if you can. - But we do not want to do that.
1958. I know, but if a man cannot pay, somebody has got to make him bankrupt. - A bankrupt employer is no good to us, anyway. The second point is that we would have relieved him of what you say he should do, and we should be insuring him against what we believe to be an obligation, which he should face up to.
1959. Mr. Emerson: Some employers do insure, some don't; if you insure, all won't? - That is most beautifully put.
1960. Chairman: Employers, as a class, generally do not want to go bankrupt any more than anybody else. - No, but I would not have thought it was a function of the trade union to insure an employee against a failure on the part of an employer.
1961. What it really means is the bankruptcy of the employer. - No, it is a failure on the part of the employer to make adequate provision.
1962. The employer fails to make adequate provision, the workman is injured, and the employer either pays up, or he does not. If he does not pay up, somebody makes him bankrupt, presumably. The loss I am suggesting you should insure against is merely the loss where the employer becomes bankrupt and, in consequence, cannot meet his liabilities. I should have thought that that was not insuring the employer, but it is insuring your union members against a loss, in consequence of the financial failure of the employer. - It really means that the trade union pays the premiums, instead of the employer.
1963. They are two different risks. One is the risk that the workman will recover a judgment, and the other is the risk that the workman, having recovered a judgment, the employer will not be able to meet it. - But if the employer insures himself then, presumably, the need for the second does not arise, because the insurance company will meet the liability.
1964. Mr. Emerson: Even if he goes bankrupt? - Yes.
1965. Chairman: I am not sure there is provision for that, at the moment. There is in the case of motor accidents, of course. There should be. - There is, surely, I think.
1966. Yes, I say there is in the case of motor accidents, but I am not quite sure if there is in the case of industrial accidents. There should be, anyhow. - (Mr. Houghton): There is, presumably, no remedy against the motorist who breaks the law.
1967. I think there is a sort of fund, from which ex gratia payments are made by insurance companies. What we are really afraid of is that if we go on piling up the number of preferential payments which have to be made in bankruptcy, we are getting dangerously near the state of things in "The Gondoliers" where everyone is somebody, and no one is anybody. It all too frequently happens, nowadays, that there is really nothing left for the general order of common or garden creditors, after the Revenue and everybody else has been paid. We are rather reluctant, however sympathetic we may be about this point, to increase the number of preferential payments. - (Mr. Geddes): I can appreciate that, but surely if

one looks at this from the point of view of relative justice, there ought to be a preferential right here. It is argued that a man goes bankrupt, and everybody is in the same cart. But are they? I come back again to my point of the injured workman. I should have thought he was in a very different position from the ordinary creditor. He is in a very different position indeed, and I would have thought that it is equally true of the man who is relying upon a week's wages to keep himself for the ensuing week, and in addition bears the burden of trying to find another job, which at the present time he may easily find, but at other times he may not find. In other words, when there is a lot of bankruptcy, he will be much less likely to find a job with that ease. I would have thought that the relative hardships here were clearly established.

1968. I see your point. - If I may pursue this for a moment, I know it is awfully difficult to put this in precise terms, as I said right at the beginning, but one of the creditors may be I.O.I.; I.O.I. may be a creditor for £200. Really, it does not matter a bit to I.O.I. whether they collect that £200 or not; they probably want it, but it probably does not make very much difference. - (Mr. Houghton): The same applies to tax collectors. I think it is absolutely disgraceful the way the Crown weighs in with its preferential claims. - (Mr. Geddes): On the other hand, you get the workman who is relying on a week's wages, which may be £8 or £9. I would have thought there was a distinct difference between the claim of the I.O.I. - whether they get 2s. in the £, and whether the workman gets 2s. in the £ or not, and gets it in two or three years time.

1969. Mr. Emerson: There is already a difference in the Act. - Yes, but I was dealing with the Chairman's point as to whether, in fact, as I understood it, there should be any priorities at all, and I was arguing that there should be. - (Mr. Houghton): An increase in the number of preferential payments could be avoided by putting compensation in and taking taxes out.

1970. Chairman: I agree with you that it does seem rather anomalous that there should be preferential payments for cases where workmen's compensation is claimable, and no preference for cases where damages in common law have been recovered, and judgment has indeed been recovered for damages in common law. - (Mr. Houghton): I am expressing a personal opinion but I do not know that any of my colleagues will disagree with me. I think the pre-emption of the Crown and of public authorities upon the resources of bankrupts, when there are individuals who may suffer extreme hardship, is a distressing social phenomenon, and I think it requires re-examination. If the history of this is studied, I believe it goes back to different times and different circumstances, when somebody was most anxious to preserve the supremacy and claim of the Crown, and one can probably link it with the days when no public servant and no public body could sue the Crown. We now have the Crown Proceedings Acts, and the Crown has put itself more and more in the position of being a private citizen, yet it retains this pre-emption upon the resources of bankrupts, in the sacred name of the preservation of the dignity of the Crown. - (Chairman): Not only the dignity of the Crown, but financing the Welfare State, which was not there at the time this started, somewhere in the early 17th century. - (Mr. Beer): I think the question is usually posed in the terms of the taxpayer versus trade creditors.

1971. Chairman: I do not think I need trouble you by asking any more questions. Is there anything more any of you gentlemen want to say? - (Mr. Geddes): No.

1972. I am very much obliged to you for your attendance. - Thank you for receiving us.

(The witnesses withdrew)

Monday, 1st October, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMERSON, F.C.A.	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

LETTER RECEIVED FROM THE NATIONAL
ASSOCIATION OF TRADE PROTECTION SOCIETIES

3, Berners Street,
London, W.1.

16th December, 1955.

B. Mactavish Esq.,
Board of Trade.

Sir,

Bankruptcy Law Amendment Committee

My Association direct me to thank you for the opportunity given by your letter of 2nd November, 1955, of putting their views to the Committee under the Chairmanship of His Honour, Judge Blagden.

With reference to paragraph 3 of your letter, their views are as set out below:-

(1) They agree that it is advisable for every Bankrupt to be automatically discharged at the expiration of two years, but only if there are considerable safeguards. The safeguards should be:-

(a) The Trustee, the Official Receiver, or any Creditor should be entitled to apply for a Caveat at any time after the completion of the Public Examination and before the Bankrupt's discharge.

(b) Immediately prior to the time for granting the discharge all creditors should be advised by post and advertisement that unless a Caveat is entered the Bankrupt is about to be discharged.

(c) With regard to existing Bankrupts the safeguards as in (a) and (b) above be applied as far as practicable.

(2) No comment.

(3) It is not considered desirable to increase the monetary limits prescribed by the Bankruptcy Acts so far as the petitioning Creditor's debt is concerned, nor with regard to the estimated value of assets to enable an Order for summary administration to be made, but my Association think that an increase should be made in the limit of £20 for a Bankrupt's tools of trade as defined in Section 38 (2).

My Association have come to these conclusions because, in the case of the petitioning Creditor's debt there is no evidence that the present limit has lead to any abuse of the process of the Court. If the limit of £300 for summary administration was increased the Creditor's discretion as to the person to be appointed as Trustee would cease to exist in a large number of cases and this power to exercise discretion is regarded by my Association as a matter of major importance.

(4) No comment.

(5) Although it is thought unlikely that they will want to do so, the Creditors should be able to appoint the Official Receiver as Trustee, the principle being that in all insolvencies Creditors should be able as far as possible to carry out their own wishes with the fewest possible restrictions.

(6) No comment.

(7) It is considered that all kinds of earnings should be included. In a modern society the previous restrictions are quite inappropriate.

(8) Anything that can be done to increase the chances of a guilty debtor being prosecuted has my Association's support. They therefore feel that it should be possible to have provision that either the Board of Trade or the Director of Public Prosecutions may be empowered to prosecute.

(9) It is considered the Deeds of Arrangement are the most satisfactory method of dealing with insolvency and cause the least trouble to Creditors. Therefore no change should be made that would upset this state of affairs. Its chief advantage is that it is quick and simple. It is a private arrangement between the Debtor and his Creditors and any Board of Trade control would only complicate matters and make it less satisfactory.

My Association wish to advocate a clarification of the order and disposition clause and Hire Purchase Agreements. Although it is considered unlikely that goods under Hire Purchase Agreement could under present legislation properly be seized, provision should be made so as to leave the matter open to no doubt at all that goods under a bona fide Hire Purchase Agreement could not fall under the order and disposition clause (see Bankruptcy Acts 1914 and 1926 Section 38(c)). It is clearly equitable that this should be done as the present legislation was passed at a time when there was little hire purchase. It is now so widespread that as a Creditor should be so naive that he would assume the Debtor owned all the assets at his place of business and that none was under hire purchase.

We also feel that the Trustee under a Deed of Arrangement should have more protection so that he can more speedily realize the assets for the benefit of Creditors. The present three month period during which a Deed can be voided as an Act of Bankruptcy should in our opinion be reduced to one month.

My Association also feel that the method of dealing with deceased insolvent estates is far from satisfactory. As the Law at present stands a Creditor must serve a Petition on the personal representative of the deceased and of course it is realised that if proceedings are commenced they can afterwards be transferred to the Court having bankruptcy jurisdiction. The difficulty is if the estate is insolvent no one will take up the position as the representative of the deceased. A Creditor is therefore faced with the great difficulty, first of ascertaining whether all parties entitled have renounced before he can even apply for Letters of Administration himself, and then having to take up that position himself. During this time the value of the goodwill of the business is often dissipated and very often the assets have also disappeared.

It is suggested that the Law be altered and that it is provided that if no application has been made to a Probate Registry within a month of the date of death a Creditor should be entitled to present a Bankruptcy Petition and that such Petition should be deemed to have been served if sent by registered post both to the deceased's last known residence and the next of kin of the deceased and advertised in two local papers.

My Association do not wish to give oral evidence, but would do so of course if the Committee so requested.

In the hopes that it may be of assistance to the Board of Trade, eight copies of this letter are being sent to you.

I am, Sir,
Your obedient Servant,

(Sgd.) C.C. WORTERS

Hon. Secretary

EXAMINATION OF WITNESSES

Mr. Kenneth Russell Cork, F.C.A.	} Representing the National Association of Trade Protection Societies
Mr. William Norman Peet, F.I.C.M.	
Mr. Charles Cowley Worters, M.B.E.	

Called and examined

1973. Chairman: Good afternoon, Gentlemen. I do not know if your Association has had a chance to examine document ELA/112 incorporating the revised ideas on the discharge scheme since the Committee started its deliberations. Do you think that is an improvement on the original scheme, or not? - (Mr. Worters): Yes, we agree that it is.

1974. One of the details you mention in your letter is that you think that a creditor should be entitled to apply for a caveat before the discharge. Do you think that is desirable? - My Association feels very strongly that a creditor should be entitled to apply, and not just the officials concerned in the bankruptcy.

1975. Do you not think there is rather a danger of applications being made by vicious or malicious creditors who might cause a lot of expense by making a series of applications? - We recognise the possibility of vicious creditors in certain cases, but we think that any application coming before the Court from a source such as that would be recognised by the Court and due notice would be taken and it would be dealt with accordingly.

1976. I do not know if you took into account the possibility of a creditor who wants to make an application borrowing the Official Receiver's name on giving the Official Receiver an indemnity? He could always do that. - We had not thought of that method of handling it.

1977. It is a case called, I believe, *Re Genese*. - (Mr. Cork): I personally had thought of that angle, but would the Official Receiver be bound to give his name?

1978. I think he is bound to if he receives an indemnity. The Court makes an order that he shall. - Well, that must clearly cover that position.

1979. I think that would be a satisfactory check on the malicious creditor. He would have to go to the trouble of putting up an indemnity. - I imagine that if he brought a frivolous application, then the Court would award some sort of costs against him, would they not?
1980. Certainly. - Would that not be rather better?
1981. If the application has got to be in the name of the Official Receiver, that provides a sort of double check against malicious proceedings. - (Mr. Worters): I think we are agreed that they are a possible danger. - (Mr. Peet): An alternative which has just struck me is that it may be possible that a creditor for £50 or more, who is entitled to apply for the debtor to be made bankrupt, could possibly be the person who would have the right to apply for a caveat in such circumstances.
1982. That might be a very good idea. It would prevent a very small creditor wasting time. - Any creditor has a right, has he not, to examine the debtor on public examination, but in practice it seldom happens?
1983. We want, if possible, rather to encourage that practice. - Well, in that case, bringing the creditors in under this proposal will encourage them to do that sort of thing.
1984. I should have thought it would be the other way round because the creditor has the right to apply for the caveat on the conclusion of the public examination under our scheme, so, if he is considering applying for it, it gives him an opportunity to attend and take part in the examination, which is a thing to be encouraged. - Of course that would not be eliminated by our proposal and he could still do that. So often in these matters one does not find things out until after the public examination. We are suggesting, therefore, that creditors should have a right after the examination for a two-year period to apply for a caveat: we are asking no more.
1985. You say you want the warning, as it were, given to creditors by letter when the 2-year period - or whatever other period is fixed - is about to expire? - (Mr. Worters): Yes.
1986. That is going to involve a lot of work and expense in bankruptcies? - You have to send out various notices all through the bankruptcy, and is one more notice going to make all that difference?
1987. The creditors have had their notice of the public examination and they ought to know from that when the two years will be expiring. - (Mr. Cork): I think it is unlikely that they will remember, as circulars have to be sent out many times during the bankruptcy. I do not think it would cause any great difficulty and I think it is a safeguard.
1988. I suppose if we suggested that a notice by advertisement be given, your answer would be, "Well, nobody reads advertisements anyway"? - I agree. I think it would act in the debtor's interest to a certain extent.
1989. How would it help him? - It would make it clear to everybody that he is just about to be discharged and that in future they would not be dealing with an undischarged bankrupt, because there is, in practice, a divergence between the length of the bankruptcy as it happens to the estate and the bankruptcy as it happens to the debtor.
1990. Surely they are two aspects of the same thing? - If the bankrupt's estate is still being wound up, the ordinary creditor will think the man is still an undischarged bankrupt, although, I agree, he ought to know better.
1991. I notice you have had nothing to say about our suggestions about a second bankruptcy, but we had a new scheme for dealing with it put

up to us by some witnesses the other day, and perhaps I might ask you for your views about it. The suggestion now made, very briefly, is this - that if say X shillings in the pound have been paid in the first bankruptcy, the assets in the second bankruptcy should be employed first in paying X shillings in the pound to the new creditors - and after that in paying both sets of creditors off equally. Do you think that is a better idea than the one originally put forward, or not? - The one that was originally put forward was that the second lot of assets should go to satisfy the creditors in the second bankruptcy?

1992. That is right. - I still think that is fairer than it is today.

1993. You would like the idea we suggested to you first; the idea I have just put to you second; and the existing system a bad third? - A very bad third, yes. - (Mr. Peet): I strongly support the suggestion of the assets becoming assets for the second bankruptcy, because I think it is true to say that usually those assets are supplied by the second set of creditors and, as I see it, in strict fairness that means that they should have the benefit of those assets in respect of their debts. - (Mr. Cork): When one thinks more about this, there is more in the second idea. I think, to be perfectly honest, it is difficult to decide whether 1 or 2 is the fairer.

1994. Well, we will call it a photo-finish between the two new ideas, but at any rate it leaves the existing system right down the course. - Yes, a photo-finish.

1995. I think we all agree that we do not want to increase the monetary limit for a petition. What about summary administration? Many people seem to think that should go up to £1,000 - (Mr. Worters): We were discussing this amongst ourselves. We felt that an increase in the summary administration might be agreed to, but we had not got as far as £1,000: we had got to something like £500.

1996. £1,000 would be more realistic, having regard to the diminished value of money, would it not? - I suppose it would, yes.

1997. I fancy that professional trustees do not very much like taking cases less than £1,000; there is not much meat on the bone in such cases? - (Mr. Cork): In small cases it is usually the Official Receiver who is appointed. Are you intending to maintain that position or not?

1998. We did not think of altering the law as regards letting private trustees in. They can always be used if the creditors want them. What we were proposing to do was to facilitate the Official Receiver's acting as trustee in non-summary cases, if he is wanted. - I think it should be both, if I may say so, because you see I still think this asset valuation, when you get to about £1,000, is quite ridiculous at that stage of bankruptcy. No Official Receiver can reasonably estimate the value of the assets, and there are cases where the creditors might well rather prefer a private trustee.

1999. Mr. Emerson: It is for the debtor to estimate the value of the assets, is it not? - When you come to the summary, it is for the Official Receiver to give his blessing to the debtor's estimate. The debtor is notoriously inaccurate.

2000. He prepares it first. - He prepares it first, but the total is based on what the Official Receiver says.

2001. Chairman: That is so, but the Official Receiver is more or less in the dark, except for the information he can get out of the debtor, is he not? - That is why I think the question of deciding whether the trustee should be a private or an official one according to the estimated value of assets is very wrong. You may get a debtor who has been trying to clear everything away from himself, and there is therefore a detailed

investigation wanted, in which case I think the creditors should have the right to choose a private trustee if they want to. I agree it is not very profitable for professional men.

2002. You would like to see the creditors having the power, even in a summary case, to appoint a private trustee by ordinary resolution? - Yes, to appoint a private trustee by ordinary resolution. Now that you have changed it so that the creditors may have an official trustee by an ordinary resolution with a large estate, I should have thought the position should be the same with a small estate.

2003. Complete freedom, either way, you mean? - Complete freedom either way, because what you are trying to do, I think, is to let the creditors have their wish.

2004. I understand that, in practice, the Board of Trade do not take action but wait until the first meeting of creditors is over, and act only if there is any doubt about it. - But if you put the limit up to £1,000, there need not be any doubt at that stage. I must make it clear that I am not quite sure whether I am speaking for the Association or myself. - (Mr. Peet): Speaking as a creditor myself, I am indifferent about the summary limit. What I do ask for is complete freedom of choice by the creditors.

2005. As regards the trustee? - As regards the trustee. Their money is at stake: they are the people who should choose, whether the assets are £1 or £50,000.

2006. While we are on the subject of the Official Receiver acting - we are wondering whether you attach any importance to the word "appoint" in relation to the appointment of the trustee in non-summary cases. What we are proposing to do is to take out of the relevant section the word "shall" - "..... the Board of Trade shall appoint some fit person" and substitute the word "may"; so that the Board of Trade, which normally does wink at the Official Receiver acting at the moment, would be strictly in the right in leaving him in the saddle if the creditors do not appoint anybody else. - (Mr. Cork): Are you not making it possible that at the meeting the Official Receiver will be nominated and voted for, as for a private trustee?

2007. No, what we are proposing to do is to leave the voting at the meeting as it is now. If the creditors do not appoint a private trustee then the Official Receiver may proceed, or the Board may give him permission to proceed. I do not think it is a very good idea myself to let the creditors appoint a man, because he may be a very busy man who may not want the job, but if the creditors do not see fit to appoint someone then the Board of Trade could, if they wanted to, lighten the burden on the shoulders of the Official Receiver. I do not know if I am making this clear? - Yes, it is to a certain extent acting by default.

2008. To a certain extent, yes. - I am not sure that that is giving the creditors the chance to express themselves as freely as I think they ought to be allowed to.

2009. Then you do attach importance to the actual appointment of the Official Receiver as trustee? - (Mr. Peet): I take it the arrangements have been made to cover the situation in the event of no creditors turning up at the meeting, which I think might arise?

2010. It often does. - Yes, it often does, but that point must be watched, must it not?

2011. At the moment, if none of them turn up, a second meeting is called, is it not? If there is a second meeting called and still no one turns up, as no one is there they cannot appoint anybody, so the Official Receiver becomes trustee by default. If the Board of Trade have power to

let him remain as trustee, that would meet the case? - (Mr. Cork): I think that the word "appoint" is stronger. In fact, the creditors have a resolution recommending that the Official Receiver be appointed. I would like to see something positive for the creditors to do, rather than act by default.

2012. I do not see quite why, because after all the Official Receiver is a public servant and I should have thought that the last word as to what duties he undertakes rests with the representatives of the public rather than with the particular creditors. - I am afraid we are getting muddled, at least we are, this end, with the kind of conduct the meeting is going to have and the actual word "appointing" which will give them the right to make a man a trustee. I think that is where there is a confusion in thought. Supposing the creditors wish to have the Official Receiver in that particular case as the trustee, then what we are wanting is for someone to resolve that the Official Receiver be the trustee and for that resolution to be supported and carried by the creditors; and then, subject to the blessing of the powers above, he will get it. I did not want it to be merely that no resolution was carried for a private trustee and therefore the Board of Trade might appoint the Official Receiver as trustee.

2013. I think there is very little difference in it really. - I think perhaps you are right, but I would prefer a definite resolution.

2014. Have you any views about joint trustees? One witness has made the point that there should be some rather drastic check on the power of appointing two or more trustees jointly. Others think that the creditors should have a free hand to do so if they want to in all cases. It does increase the expense does it not? - (Mr. Cork): No, I do not think it increases the expense. I think, except in unusual circumstances, it is most unsatisfactory.

2015. That is rather an argument for use at the meeting than for incorporation in the Act? - I think so. There are cases where it is essential to have joint trustees.

2016. Have you any views in what sort of cases; the very big cases? - Well, a case where there are decidedly divided bodies of creditors, with different interests, and unless you have a joint trustee you get a very dissatisfied group of creditors. But I think it is a matter, as you say, that ought to be argued against as much as possible.

2017. Would you be in favour of any actual statutory restriction on the appointment of joint trustees or not? - No, I think we ought to stick to the belief that creditors could row themselves into what sort of mess they like; it is their money and if they want it they can have it. - (Mr. Peet): As one of the rowers, I support that.

2018. I see you have nothing to say about the question of whether the conclusion of the bankruptcy on payment of 20s. in the £ should be compulsory or permissive. At present the Court has discretion not to grant an annulment, even if 20s. in the £ is paid. We are rather in favour of making it obligatory to grant it. I do not know if you have any views on that? - (Mr. Worters): No, none of my societies have expressed any views on that, unless Mr. Peet has some ideas? - (Mr. Peet): No, I have had no experience of cases where 20s. in the £ has been paid.

2019. Where 20s. in the £, plus statutory interest and costs and everything is paid, we rather feel that if that happy state of affairs comes about the Court should be obliged to annul the adjudication and not to preserve the bankruptcy as a mere empty shell. - I can see nothing against that. I am wondering what the objections are.

2020. The objections are on ethical grounds. It is said that a man might really be buying an annulment, under those conditions. A rich uncle comes forward, puts up the money, and the wicked nephew gets right out of it straight away. As the annulment would not preclude a prosecution if the nephew was all that wicked, I should have thought there was

- everything to be said for it. It does provide him with an incentive. - (Mr. Worters): Which is to the benefit of the creditors. - (Mr. Peet): Speaking as a creditor, if he pays 20s. in the £ - either through a rich uncle or what have you - I do not mind what happens after that.
2021. The rich uncle may not be prepared to help his naughty nephew if he is not certain that the bankruptcy is going to be annulled, and to that extent a compulsory annulment is very much in the creditor's interest. - I think, speaking for myself, I support compulsory annulment, but I am not speaking for my two colleagues. - (Mr. Worters): I am not speaking for my societies, but I personally would be inclined to look at it in the same way as Mr. Peet. - (Chairman): Mr. Cork is, I know, in favour of compulsory annulment.
2022. Mr. Cork, we have discussed deeds of arrangement together before? - (Mr. Cork): Yes.
2023. I do not know if you have anything you wish to add on the subject. Do you wish to amplify your idea about the possibility of going into bankruptcy if there has been misconduct, for instance? - I cannot amplify really except to say that the more I think of it, I think I am satisfied that it is essential to be able to change to bankruptcy: I think it is a pity that once you have all agreed about a deed you are bound. I do not like manoeuvres; and the manoeuvre at the moment is to leave one person out for the time being to see what is going to happen, and bring a petition later if he finds that the debtor does not behave or has been a naughty boy. I think we ought to cover that.
2024. Provided there had been misconduct? - Provided they can prove to the Court that there is some reason for it. They would have to go and state their reasons, and persuade the Court.
2025. Do you favour the reduction of the period of petition founded on a deed to one month? - Yes, definitely.
2026. Do you like the idea of the Court having an express power to dismiss a petition presented within that month? - Yes. - (Mr. Worters): Yes. - (Mr. Peet): Yes.
2027. And power to dismiss, if it is satisfied that the receiving order is not in the interests of the creditors? - (Mr. Cork): Yes, with costs if possible.
2028. He does not have them at the moment? - No.
2029. In principle, you are against Board of Trade control over trustees? - (Mr. Worters): Yes.
2030. I suppose you do not object to having someone having power to intervene in the case of the trustee misconducting himself - not the Board of Trade, but the Court? - (Mr. Cork): I was just wondering what would happen when a trustee misbehaved himself.
2031. The Court could be given those powers which it has over a defaulting trustee in bankruptcy, including committal. - Who would bring the case; how would it come up?
2032. Presumably the Board of Trade or the creditors. - The Board of Trade would know because they do an audit of deeds, do they not?
2033. Yes. - Well, they might not know. They only audit what they get.
2034. You are in favour of tightening up the position as to defaulting trustees? - Yes, because you are in bankruptcy then. I think it is right that they should keep a fatherly eye on it. I think that is enough. I think that if a trustee is in any way in default the Court should have the power to deal with him. It must have.

2035. I understand you to say that you are against the Board having any greater powers than it has at the moment. Favouring, as you do, elasticity in deeds of arrangement, I take it you would not be in favour of having a model deed, would you? - (Mr. Worters): Again, we must speak here from our own opinion. We have no views from the societies; but there must be considerable argument in favour of a model deed in some way, as you do for a limited company with Table A in the Companies Act, and matters of that sort.

2036. Would you think it should be compulsory or not? - The lines on which we were thinking were that, instead of having it compulsory, any deviation from the standard deed should be notified. - (Mr. Cork): Notified to the creditors when they are asked to assent. - (Mr. Worters): When the creditors were asked to assent to a deed, it should be stated that the deed was in the form of Table A, or whatever it was, with the following exceptions - such and such a clause is omitted and perhaps a new clause has been inserted.

2037. If they do not read the model and they are then told that the deed omits clauses A, B and X from the model, they are no wiser than they would be otherwise? - I agree, but you cannot provide for the man who will not read or who will not consult his professional advisers. - (Mr. Cork): With respect, I would like to disagree very strongly. There will be a model deed drawn up, which is presumed to be a fair deed, which will in fact bring everything in. You have to notify the creditors when you want to leave something out, and they, even if they have never read the deed, will quickly see what you are excepting - his private motor car or the money he will get from his rich uncle. The creditors will immediately see what is being left out and will quickly see how the deed is not being fair, if indeed it is not being fair.

2038. It rather depends, does it not, in what terms you tell them of the omission? If you merely say that clause A does not appear in the deed, for instance, they will not be much wiser; but if you say, "This deed assigns to the trustee all the debtor's property except his Rolls Royce", then indeed their eyes are opened. - Yes, I think that in fact it will not be done by just deleting the clauses. I think the letter ought to state just exactly how it differs from a standard deed, giving the illustrations. I feel very strongly that a standard deed is an essential.

2039. An essential - you put it as high as that? - (Mr. Peat): I support Mr. Cork in this connection. Especially in pre-war days, one was quite often asked to give a consent without a sight of the deed, which always seemed to me unfair. I have a feeling that if we do have a model deed most firms of any size will have one, as indeed most firms have a copy of Table A in their office, and therefore they will be in an easy position to check any variation, upon receipt of a letter from the proposed trustee.

2040. You think most people will have the thing to hand, so to speak? - I think most responsible firms will have the model to hand, in the same way as I think they have Table A and the Companies Act to hand at the moment.

2041. I see you want the question of hire purchase cleared up. We were proposing wholly to abolish the order and disposition clause. What do you feel about that? - (Mr. Worters): We are very pleased. We feel that conditions have changed so very much from the time in which the order and disposition clause was useful and that the time has come for its deletion.

2042. As regards the deceased insolvent, we were proposing to recommend that the Court should be given power to dispense with service altogether. That would enable the receiver to go ahead, even though nobody has taken out probate or letters of administration. Does that not solve the problem? - Yes. The difficulty has always been, where do we

start and who do we get at, and who will give authority for a particular type of proceedings to be initiated? This seems to me to meet our case.

2043. We were proposing, under the fraudulent preference Section, so-called, to have a clause that any payment of a past debt, made during the last 21 days before a petition, should be voidable, whatever the intent with which it was made, so as to get at all last minute payment which did in fact give anyone a preference. Do you think that is a good idea, or do you not? - (Mr. Peet): Well, I do. I think it is an open secret that fraudulent preference actions are most difficult to bring and very seldom are successful when brought. It will rather bring it into line with the Companies Act, which I think is 28 days. I think 21 days probably is as good. To put it into a nutshell, I strongly support your proposal.

2044. With regard to the priority of assessed taxes, do you think the existing priority ought to be cut down? - (Mr. Worters): I had better be quite honest about this and say that, as far as I am concerned, I do not know.

2045. Well, it does result in the Inland Revenue sometimes coming forward with unforeseen claims for a past tax-year and simply scooping up all the assets which might go to the unsecured creditors, and delaying the proceedings. - (Mr. Peet): Could you tell us how far the Inland Revenue do go back?

2046. They can go back for an indefinite time and pick the very best year. - They can pick one year only?

2047. One year only they have priority to: they always pick the best year. That seems to us rather unfair. - Well, speaking as a creditor, of course, it does seem unfair. Speaking as a taxpayer, which I suppose we all are, the presumption is that the man was solvent at the time the tax liability occurred, and he has had credit since and become insolvent since the date the tax liability was incurred. I can therefore see justice in the Inland Revenue having a preferential claim for one year. There are two points of view, of course.

2048. Any one year? - Yes, any one year.

2049. Mr. Emerson: You do get the extreme case where you get an extreme rogue who overvalues his stock to get an advance from the bank when, in point of fact, he has not made any profit. - (Mr. Cork): I think myself that, if the Revenue are so dilatory as not to sort out the income tax due when they have that opportunity, it is wrong for them to go back and take one really juicy year for which they get preference. It always has seemed wrong to me. The only difficulty is that I think if they are to be treated preferentially at all they ought to be able to go back a little way, but I do not quite know how long that should be - possibly not longer than, say, the penultimate year.

2050. We had two schemes before us, if we did decide that priority should be given. I should like to explain them to you and you can decide which you like best. One of them was this. First of all you pay out all the other creditors who are entitled to be paid in priority; then, if there is anything left over, the Inland Revenue would not get preferentially more than one-half or 50 per cent. of that. This would ensure that in all cases in which there was a surplus after paying off the other preferential creditors, the unsecured creditors would have a little something out of the kitty anyway. That is one scheme. Now the other scheme was this - that the Revenue can have in priority the average amount of tax over the past years, which is easier to illustrate than to define. However, supposing there were four complete tax years during which the man had paid no tax, and the amounts due were nil in the last year, £1,000 in the year before, £2,000 in the year before that, and then £3,000 in the year before that, making £6,000 due to the Inland Revenue altogether: they get in priority £1,500 only, being one-quarter of the total amount over the four years. There is a third alternative which is to try to fuse those two, but we

find that it is most frightfully complicated, and probably we can rule that out. Now, of the other two, I do not know which one you prefer? - I think the average year is the better of the two, but I would prefer them to be restricted in the number of years they go back. I think that of your two suggestions, the average of the past taxes is the better. I had a case which may be of interest to you where a company - though this would have applied equally in bankruptcy - had not prepared or agreed any balance sheets from 1940 to 1954. The company was trading quite successfully, making from £30,000 to £40,000 a year, and ordinary unsecured creditors were £22,000. When finally the Inland Revenue caught up with them, the company paid a preferential claim of £90,000 for one year for profits tax and income tax. The unsecured claims were such that the creditors only got 15s. in the pound. There was a kind of debenture in front of them of which they knew nothing.

2051. Yes, that is the effect. - It can have a very unfortunate effect and I am glad that something is being done to cut it down.

2052. The snag is, as we see it, that at the moment the average scheme does not guarantee something for the unsecured creditors to the extent that the other one does, but it would have a very salutary effect in encouraging the Inland Revenue to get their money in and not leave a large number of years taxes outstanding. It is a thing to be borne in mind. - If they could only go back two years it is fair, because if there is a large assessment, he has made a large profit, and the Inland Revenue are entitled to their piece of it. But the creditors are usually incurred during the period of the loss, and if the Revenue are allowed to go back many years you are paying the Revenue out of something that was never theirs.

2053. Mr. Emerson: As regards the suggestion of going back for a limited number of years, would that apply to a back duty case? - The Revenue have powers of provisional assessment, and if they have missed their chance it is their fault. The poor creditors have done nothing wrong. The Inland Revenue may possibly have been misled or misguided, but at least it was their job, whereas the creditors are having their money taken for something which is absolutely nothing to do with them. After all it is a great privilege to be a preferential creditor to start with. We are only saying that they should be limited in the time they can go back preferentially. They still rank as unsecured creditors for all that is due to them, and they are lucky to be allowed that. - (Mr. Peet): Put briefly, I support Mr. Cork. - (Mr. Worters): I think, of the two schemes, the average one is the preferable, with the limitation of the number of years which you can go back.

2054. Chairman: You would like the average scheme, plus a limit on the number of years? - Yes.

2055. There is a lot to be said for that. How many years do you contemplate limiting it to? - I thought you mentioned four.

2056. I only gave that as an example. - Well, considering it very quickly, it seemed to me that that method of giving the Inland Revenue its pound of flesh would not be unreasonable.

2057. Mr. Emerson: Mr. Cork suggested the penultimate year only. - (Mr. Cork): I suggested the penultimate year or the current year.

2058. The better of those two years? - Yes. - (Mr. Peet): That is my view. I suppose Mr. Cork, not Mr. Worters.

2059. And leave them to get what they can as ordinary creditors, the same as everyone else? - Yes.

2060. Mr. Beer: As you represented creditors in the main I was rather surprised that you did not fasten on to the percentage suggestion, which did ensure that every creditor got something. - (Mr. Worters): Rather like Mr. Peet, I was trying to look at it from the taxpayer's point of view and from the creditor's point of view, not solely from the creditor's point of view.

2061. Chairman: I think there is a lot to be said for the average scheme, simply from the point of view of simplicity. - Yes, I agree.

2062. Thank you very much, Gentlemen. We are very much obliged to you.

(The witnesses withdrew)

Wednesday, 3rd October, 1956

Present

HIS HONOUR JUDGE BLADEN	(Chairman)
MR. H. EBER, C.B.	
MR. C.E.M. EDGERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. B.E.P. MACFARLANE	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

MEMORANDUM SUBMITTED BY
SIR GEORGE HAROLD CURTIS, C.B., CHIEF LAND REGISTRAR
H.M. LAND REGISTRY

1. Introductory

The Chief Land Registrar is responsible under the Land Charges Act, 1925 for the registration, amendment and cancellation of petitions in bankruptcy in the Register of Pending Actions and receiving orders in bankruptcy in the Register of Writs and Orders kept under that Act. Under the Land Registration Act, 1925 it is the duty of the Chief Land Registrar as soon as practicable after the registration of a petition in bankruptcy in the Register of Pending Actions to enter (of his own motion) a "creditors' notice" against every title and charge of which the bankrupt is registered as proprietor under the Land Registration Act, 1925 and which appears to be affected by the petition. The effect of entering a creditors' notice is to subject all subsequent dealings by the bankrupt proprietor to the estates, rights and claims arising out of the bankruptcy. When a receiving order is registered in the Register of Writs and Orders, again it is the duty of the Chief Land Registrar under the Land Registration Act, 1925 as soon as practicable to enter (of his own motion) a "bankruptcy inhibition" against every title and charge registered under the Land Registration Act which appears to be affected.

Dealings with registered land for moneys worth by the bankrupt prior to the entry of a creditors' notice or bankruptcy inhibition on the register of title are good against the trustee in bankruptcy providing the grantee had not at the date of the execution of the disposition notice of the act of bankruptcy petition, receiving order or adjudication. Until registration of a creditors' notice a petition is not notice or evidence of any act of bankruptcy alleged in it (section 61(2) of the Land Registration Act, 1925) and it is thought that the mere filing of a petition, even if recorded as a pending action under the Land Charges Act, 1925, is not in itself constructive notice to a purchaser of land from the bankrupt when the title to land is registered under the Land Registration Act. This opinion is based on the fact that registrations under the Land Charges Act do not affect the title to land registered under the Land Registration Act (section 23(1) of the Land Charges Act, 1925).

It will be apparent, therefore, that the main interest of H.M. Land Registry in any revision of bankruptcy law is with the machinery which the department is charged to operate under the Land Charges Act and the Land Registration Act and the comments below are necessarily restricted because of the somewhat narrow interest of the department in this subject.

2. The following are the comments on the specific questions raised in the memorandum.

(a) Matters upon which evidence is particularly requested.

- (i) Discharge - No comment. As regards the scheme outlined in the appendix to the letter under reply, H.M. Land Registry would only be concerned if, as does not appear to be the case, there were any proposal involved regarding the period of 5 years when registrations of petitions and receiving orders lapse under the Land Charges Act.
- (ii) Second or subsequent bankruptcies - No comment.
- (iii) Monetary limits - No comment.
- (iv) After acquired property - A welcome proposal in view of the administrative difficulties under the Land Registration Acts in giving effect to the doctrine of *Re Pascoe* [1944] Ch. 219.

It is assumed that a trustee seeking to claim as after acquired property any land the title to which is registered will be instructed to apply for substantive registration pursuant to section 42(1) of the Land Registration Act, 1925 or for the entry of a bankruptcy inhibition under section 59(1) *ibid*.

- (v) Official Receiver as trustee - No comment.
- (vi) Revesting of surplus assets - This proposal is welcomed as affording a means whereby redundant registrations of petitions and receiving orders under the Land Charges Act, 1925 could be cancelled inside the five year period (after which they lapse). Persons who may now have to consider the effect of section 69 of the Bankruptcy Act, 1914 on investigating title to land would also benefit.

To assist the operation of the Land Charges Act this proposal should be linked with an Order of the court (made at the instance of the trustee) reciting the material facts, annulling the adjudication, rescinding the receiving order, dismissing the petition and directing vacation of the relevant registrations under the Land Charges Act, 1925 upon application to the Land Charges Superintendent in the prescribed manner. Reference to specific assets which revert in any particular case is not required. In the few cases where the trustee in bankruptcy has been registered as proprietor of the land under section 42 of the Land Registration Act, 1925, rule 131 of the Land Registration Rules, 1925 would enable the bankrupt to be registered as proprietor in place of the trustee on production of an office copy of the Order of the court and such Order would enable the creditors' notice and bankruptcy inhibition to be cancelled in those cases where the trustee has not been registered as proprietor of the land.

- (vii) Section 51 of the Bankruptcy Act, 1914 - No comment.
- (viii) Prosecutions - No comment.
- (ix) Deeds of Arrangement. If these proposals are intended to cover the circumstances in which a deed of arrangement is finally determined or 'spent' the Committee will doubtless have in mind that registration of a deed under Part IV of the Land Charges Act, 1925 can only be vacated inside the five year period (after which it lapses) pursuant to an Order of the court: see paragraph (vi) *supra*.

(b) The following items relate to difficulties which have been encountered in the administration of the Land Charges Act and the Land Registration Act. To some extent they perhaps relate to matters more appropriate for consideration on revision of the Bankruptcy Rules; but it is assumed that the Committee will initiate revision of these Rules.

(1) Disclaimer of Onerous property

(a) It is suggested that consideration be given to the implications of *Re Thompson and Cottrell's Contract* [1943] Ch. 97 (and particularly the remarks of Uthwatt J. at p. 100) in relation to section 54(6) proviso. Is it intended, for instance, that a mortgagee of a disclaimed lease who fails to apply for a vesting order under rule 278 of the Bankruptcy Rules, 1952 should nevertheless remain in a position to realise his security at some future time? If not, the following amendment to sub-section (6) *ibid.* is suggested.

For the word "declining" substitute "who fails to apply for or declines".

The present state of the law makes it doubtful whether a registered leasehold title subject to incumbrances should ever be treated as determined and the registration thereof under the Land Registration Act annulled on disclaimer.

(b) It is assumed that the power to disclaim freeholds is to be expressly confirmed in which case the provisions of section 42(2) of the Land Registration Act, 1925 (which are now limited to leaseholds) should be extended to apply to registered freehold property *Cf. Liabilities (War-Time Adjustment Act, 1941 section 5(2) and rule 64(c) of the 1944 Rules).*

(ii) Voluntary Settlements. The following questions in relation to section 42 of the Bankruptcy Act, 1914 have raised doubts in the Registry:

(a) Does the section operate to postpone merger of a lease acquired by way of gift? It seems that an estate owner, although entitled to the lease and the reversion in the same right may nevertheless be under a duty to keep the lease on foot; *Cf. Capital & Counties Bank, Ltd., v. Rhodes* [1903] 1 Ch. 631 at p. 652.

(b) Does a lease granted without fine at a peppercorn rent come within the definition of "Settlement"?

If amendment of section 42 is under consideration the Committee may like to know that there is no record in the Registry of any attempt to seek rectification of the register of title or to claim compensation from the Land Registry Insurance Fund on the ground of "avoidance of certain settlements".

(iii) Powers of Trustee. The powers of dealing with or acquiring an interest in land with the consent of the Committee of inspection under section 56 are not very clear and it is doubtful what legal significance can be attached to a consent to a transaction which is in fact unauthorised. It is suggested that section 56 should be extended by providing that permission given in a prescribed manner should be conclusive evidence that the trustee was acting correctly and within his powers.

(iv) Renewal of registrations under the Land Charges Act, 1925. Attention is drawn to the fact that the Land Charges Act authorises renewal of registrations of petitions and receiving orders but that the Chief Land Registrar is not concerned to verify the propriety of any application for renewal which is made to him (rule 1(6) of the Land Charges Rules, 1926). The Bankruptcy Rules, 1952 do not appear to contain any provisions regarding renewal of registrations and for the sake of consistency (if nothing else) it is suggested that provision should be made to cover this point: see section 19(2) of the Land Charges Act, 1925 and Re Receiving Order (in Bankruptcy) [1947] Ch. 498.

(v) Registration of Trustee under Section 42(1), Land Registration Act, 1925. When the title to the land is registered the transmission of the legal estate in consequence of adjudication can only be recorded on the register if an application by the trustee is made. If no such application is made persons interested must investigate the title having regard to section 61(5) of the Act. This constitutes a necessary, but, from a conveyancing point of view, undesirable exception to the rule that the registered title is vested in the registered proprietor thereof.

On adjudication a trustee presumably knows what land (if any) is included in the property of the bankrupt and it is suggested that it might be made obligatory under the Bankruptcy Rules for trustees to apply as soon as practicable thereafter for registration pursuant to section 42(1) and rules 174 and 176 of the Land Registration Rules, 1925. The evidence mentioned in those rules has in any case to be furnished when the land is sold and no saving of Land Registry fees results from leaving the application to be made by the purchaser as seems to be the present practice.

It is not suggested that any action be taken with reference to past adjudications.

EXAMINATION OF WITNESSES

Sir George Harold Curtis, C.B., } Chief Land Registrar,
H.M. Land Registry

Mr. Clarence Noel Tatham Waterer) H.M. Land Registry

Called and examined

2063. Chairman: Sir George, you are Chief Land Registrar and you are concerned with the Land Charges Act and Land Registration Act so far as they are concerned with bankruptcy? - (Sir George Curtis): Yes.

2064. It is a little bit off our beat perhaps, but are you happy about the term "bankrupt proprietor" which is used in those Acts? - I do not think I had really thought about it.

2065. It has always struck me as a curious expression, because ex hypothesi the man is not a bankrupt at the time he is described as a "bankrupt proprietor". I do not know whether you can think of a better phrase? - I do not think anyone has ever commented on it before, at least to my knowledge. It is a little difficult to see quite how you could describe him otherwise - "the bankrupt ex-proprietor", perhaps.

2066. Or "potentially bankrupt proprietor"? - He might be bankrupt and a proprietor in respect of after acquired property, of course.
2067. He might. The Act describes him as a bankrupt proprietor as soon as a petition is put on, when he is not. It is an extraordinary thing. I am afraid the Land Registration Act does not bear a very detailed scrutiny. You will find a lot of odd things in it.
2068. I do not know if you have seen our terms of reference, but we have been asked to recommend amendments to the Bankruptcy Act and the Deeds of Arrangement Act. We have not been given carte blanche to amend the law of bankruptcy, so I do not think we can do anything very much about amendments even to the Bankruptcy Rules, let alone Land Registration or Land Charges Rules. - True, but we feel that it is to the advantage of everybody, including the Land Registry and the Land Charges Department, that bankruptcy law should be simplified so far as it possibly can be. That would help us not only in the operation of the machinery which is entrusted to me under the Land Charges Act and the Land Registration Act, but also of course from the purely conveyancing angle in regard to the investigation of title on first registration, and in regard to the investigating points which do arise on registered titles. We do not much like the situation which is dealt with in Section 61(5) of the Land Registration Act, where you have the position that the legal estate is vested in the trustee in bankruptcy although you have the bankrupt entered on the register as the proprietor. That is quite contrary to the whole theory of land registration, that the registered proprietor is the owner of the legal estate.
2069. That could be put right however only by an amendment of the Land Registration Act or the Land Registration Rules, could it not? - No, we think not, because what it says is:
- "If and when a proprietor of any registered land or charge is adjudged bankrupt, his registered estate or interest, if belonging to him beneficially, and whether acquired before or after the date of adjudication, shall vest in the trustee in bankruptcy in accordance with the statutory provisions relating to bankruptcy for the time being in force".
- Therefore there would be no necessity for amendment of this subsection if any provisions were introduced providing, for example, that after acquired property should not vest in the trustee unless he actually intervened to secure its vesting.
2070. Supposing that happens, the trustee I imagine has got to perfect his title in whatever is the proper manner, or risk losing it, has he not? - Yes. At the present time of course unless the trustee acts, certainly in the case of after acquired property, that is where a person who has been adjudged bankrupt subsequently buys registered land, there would be no entry on the register at all to protect the creditors under the bankruptcy, and unless the trustee intervenes to secure some protective entry being put on the register then of course the registered proprietor has unfettered powers of disposition. But I am not aware of any case where a bankrupt has been registered as proprietor and has dealt with the property in such a way as to cause loss to creditors, and certainly no claim has ever been made on the Land Registry insurance fund.
2071. I noticed that in your memorandum I was very interested to see it. - We have never had a claim in that regard.
2072. Do you want us to recommend any special provision in the Bankruptcy Act making it obligatory on the trustee to register anything if he claims after acquired property? - We should very much like you to do so.
2073. It could be done. We are talking only of registered land? - Certainly, yes. We were just thinking of the machinery by which he would get the register altered if he were intervening.

2074. Would he not have to satisfy the appropriate person that the man whose name was registered was a bankrupt; that he was trustee in the bankruptcy; and that he had intervened to claim the property? - Yes.
2075. He has only got to satisfy you of those three things and then I suppose you register him as proprietor? - The other point of course being that the property concerned was the beneficial property of the bankrupt. - (Mr. Waterer): Rules 174 and 176 of our Rules prescribe the evidence that he would have to furnish. He could then either apply for the entry of an inhibition or else for substantive registration of himself as the proprietor.
2076. I suppose strictly the trouble would be, would it not, when he discovers that the bankrupt has acquired this registered land, and pending his making up his mind as to whether he is going to claim it or not, he ought to put on a bankruptcy inhibition, and if he decides that he is going to claim it then he ought to apply for definite registration, ought he not? - (Sir George Curtis): The bankruptcy inhibition is registered when the receiving order is made.
2077. That would not apply to after acquired registered land? - It would not apply then.
2078. So until the trustee did something about it there would be nothing on the record to show that the bankrupt was not perfectly capable of making a good title? - No.
2079. But a solicitor purchasing from him would in fact make the usual search in bankruptcy, would he not? - No, not in registered land.
2080. Mr. Emerson: I am not at all clear about this procedure. Supposing a bankrupt acquires a freehold property, say by a will, after he has been made bankrupt, is there any procedure whereby the Land Registry can notify the trustee in bankruptcy that registered land had come into their province? - No, none.
2081. Would it be possible? - No, I do not think it would be possible.
2082. Chairman: I gather from what Mr. Waterer was saying that you are not a sort of lost property office to trustees in bankruptcy? - I think that is a very good point.
2083. If we might hark back for a moment, I see you have no comment to make on our proposals for automatic discharge of bankrupts. I do not know if you have seen a document called BLA/112? - Yes, Mr. MacTavish sent us a copy.
2084. I think you are equally unaffected by the scheme as modified, are you not? - We are indeed. Our only concern of course is about the five-year period after which the bankruptcy inhibition and orders lapse, in the same way as other inhibitions and orders lapse, on the Land Charges Register.
2085. We were not proposing to tinker with that, and I do not think we can. - That is the only point we would ever want to make. We did have a point, if we might ask the question, as to what would be the normal conveying evidence which would prove the date of an automatic discharge. How would that be shown, because if you are dealing with a bankrupt who had been discharged in the way proposed in the scheme it would be very useful to know that in fact the discharge had operated in the case of property subsequently acquired by him?
2086. I think we were proposing that the automatic discharge should be gazetted like any other discharge. It is a matter for Rules really, but I agree entirely that there must be some means by which it would be easily proved that discharge had taken place. - Quite. That is the only point we should have on this question of the automatic discharge.

2087. If Rules provided that the gassing of the automatic discharge should be evidence of it, that would be good enough for your purpose, would it not? - The solicitors would have to lodge a copy of the Gazette. I do not think we would be interested in this from the point of view of land charges. What we would be interested in would be, for example, on an application for first registration, where a search disclosed a bankruptcy and then a purchase by that person had been made after the date of the bankruptcy and after the date of a discharge which had been proved in one or other of the ways suggested. For example, take the case of a bankruptcy of "A" in 1960; in 1962 he secures an automatic discharge; in 1963 he buys "Whitesacre"; and in 1964 he sells "Whitesacre" to "B". "B" of course makes his usual searches in the Land Charges Department, which would disclose the bankruptcy, and the question would then arise, was this after acquired property subject to the bankruptcy, but the answer to that would be: "See the discharge dated so-and-so".

2088. That is exactly the position as things are at present, is it not? -

(Mr. Waterer): There is evidence now, and that is perfectly satisfactory. It is only by a Court order that you can get a discharge, and we were contemplating really the position of an automatic discharge without any evidence. That was the point, I think.

2089. Yes, it is substantially the same. - (Sir George Curtis): I agree, in principle, there is no real difference, but if as I imagine there is going to be a substantial number of these automatic discharges, rather than merely waiting for the five-year period to elapse, it is important to get this settled from our point of view.

2090. Mr. Lloyd Williams: Might we consider a copy automatically being sent to the Land Registry in the same way that I automatically send notice of the filing of a petition? - I do not think we should want that. If you sent them to us we should have to keep them somewhere or other.

2091. Chairman: You think that the suggested help would in fact be a nuisance and an annoyance rather than a help? - It might be, yes.

2092. We were interested in your suggestion in connection with revesting of surplus assets. The words you suggest adding I think could conveniently be added to subsection (4) of Section 69: "and directing vacation of the relevant registrations under the Land Charges Act, 1925 upon application to the Land Charges Superintendent". Those words would be completely adequate for your purposes, would they? - Yes, they would, absolutely.

2093. You point out here that, so far as the Land Registration Act and Rules go, it is not necessary to have anything of the sort? - No.

2094. In connection with deeds of arrangement, we were proposing to recommend that the only deeds registerable with the Board of Trade should be deeds which either convey property to a trustee or contemplate the future conveyance of property to him. Do you see any reason at all why instruments such as deeds of inspectorship and letters of licence and that kind of thing, which at the moment have to be registered as deeds of arrangement, should be, if they do not convey any property? - I do not see any reason at all.

2095. It seemed to us that it was quite unnecessary to register them. - Yes. - (Mr. Waterer): You are speaking of registration with the Board of Trade?

2096. Yes. - No, we are not really concerned. - (Sir George Curtis): We are not concerned, and we do not see any point in it.

2097. A proposal has been made to us which might interest you, about deeds of arrangement, that the Court could in certain circumstances, where it was proved that the arranging debtor had been guilty of misconduct in relation to his affairs, throw the estate into bankruptcy notwithstanding that a deed had been executed. It seemed to us in some circumstances

that might be valuable. Do you see any objection to it? - None at all. I should have thought it was a very good arrangement. I think we should be quite happy about that.

2098. I am rather mystified myself, probably through my ignorance of the subject, but what happens where a deed of arrangement has been registered under the Land Charges Act and the land has not been realised by the trustee in five years, and consequently the registration lapses, does that mean that he may have difficulty in disposing of it after the end of the five years? - I do not think it would affect his powers of disposition. All it means I think is that if the person concerned, the debtor, has the title deeds and he cares to suppress all notice of the deed of arrangement, then a purchaser from him would not, by searching in the Land Charges Department, find out the existence of the deed of arrangement, and would get a good title.

2099. It is up to deed trustees to see that they collect the deeds relating to any lands within the five years? - Certainly, yes.

2100. It does apply to deeds of arrangement, does it? - Yes. The registration lapses after five years, but it can be renewed, of course.

2101. It can? - Certainly, the trustee should renew it. But, if he does not, then it will not be revealed on an application for search.

2102. Of course, the trouble in this 1947 case which you cite here was that the application for renewal was made long after the application for discharge had been made effective? - Yes.

2103. As regards disclaimer of onerous property, we were proposing to give an express power to disclaim freeholds. If, as you suggest, we substitute for "declining" the words "who fails to apply for or declines", that would meet any difficulties you have in connection with disclaimer, would it not? - I think so, yes.

2104. I cannot speak for my colleagues but it seems to me those words would be very valuable. - We would very much like to have them put in. At the present time, as we say in the memorandum of course, although we usually take a chance, we are taking a chance if we treat a disclaimed lease as having merged, although there is an outstanding mortgage affecting it.

2105. If the mortgagee sits on the fence and does not take any notice of the disclaimer, I do not see why he should come in afterwards and realise it? - No.

2106. On the merger question, do you want to alter the law about voluntary settlements? As far as I can make out, there might be cases in which a person who wants a reversion of the lease might be under a duty to keep the lease alive. - I do not know that we want to alter the law. We really want someone to clarify it for our own benefit. I imagine this is really the sort of thing that might be dealt with in Rules, and it might be possible in Rules to set the position out with some clarity, but I agree it is awfully difficult to deal with isolated items of this kind even in Rules.

2107. On the other point you had, a lease granted without fine at a peppercorn rent, do you want that included in the definition of "settlement"? - (Mr. Waterer): Is it or is it not, now?

2108. I do not know. The trouble as I see it is that, if we make a provision in the Act that "settlement" does include that in the definition, the first thing that anyone who wanted to dodge it would do would be to make a lease without fine at two peppercorns rent. They could go on playing that game ad infinitum. I should have thought if we wanted to do anything about it at all the better way to do it would be not to think in terms of peppercorns but "leased at", shall we say, "less than one-quarter

of the rack-rent". - (Sir George Curtis): Certainly. - (Mr. Waterer): The actual provision would not worry us, I think. We operate whatever is the law. All we are concerned in is to know what the law is.

2109. I think you are not unreasonable in asking that the law should be clarified. - (Sir George Curtis): That is what we want.

2110. But I am rather anxious that if we attempt to clarify the law we should not leave a gap in it through which a person can drive a coach and four. - I quite agree. It is very difficult to know quite which way to go, but I would like to say that I think your suggestion is an excellent one.

2111. That "settlement" shall include a lease without fine at less than a quarter of the rack-rent? - Yes.

2112. Could you explain to us what you consider is obscure about the powers of the trustee under Section 56? We would like to try and clarify any obscurity there is. - I think our point was that we are not clear that any authorisation given to the trustee by the committee of inspection empowers him to do anything in particular. That was really what we had in mind, and what we would like, if it were possible to do so, would be to enact specifically that if he does get an authority in a prescribed form by prescribed people, that authority is conclusive evidence of the validity of the act which he does.

2113. You are really concerned not so much with the authority as with evidence of the authority, that is what it comes to? - As we understand the position, the consent of the committee at the moment does not carry you very far. You can have complete evidence of that consent, but what is the effect of the consent? We are not sure that it has much effect.

2114. Supposing he purports to mortgage some parts of the bankrupt's property and he has not in fact got the consent, is the mortgage invalid? That is one of your troubles, is it not? - We are not sure that it would be valid even if he got consent. - (Mr. Waterer): The Act at the moment specifies various things, does it not?

2115. What sort of thing have you in mind? - Exchanges, I think. I am not sure what the Act specifies. Compromise, I think is one. If a committee purports to consent to something, is it automatically binding on the creditors or is it not? We would like to know conclusively that it was. I think that is really the only point.

2116. Even if he has got the consent it does not prevent an aggrieved creditor from going to the Court. - That is it, you see. We would like something in providing that a permission shall be conclusive evidence that the trustee is acting correctly and within his powers, ruling out the present possibility of an aggrieved person going to the Court.

2117. But is not that rather dangerous, because if the trustee was a very naughty trustee there is no physical reason why he should not forge a minute showing that the committee had consented? - (Sir George Curtis): We are always of course up against the difficulties of forgery.

2118. One cannot of course stop forgery by legislation. - No, I am afraid not. - (Mr. Waterer): What is our present position, if a permission were set aside after we had registered something pursuant to such permission? - (Sir George Curtis): If the trustee purports to deal with property on the register, and provides a consent by the committee of inspection as evidence of his right to do so, and we give effect to that transaction on the register, and subsequently it is held that the trustee should not have carried out that transaction, we could not rectify the register against the person in whom we vested the property.

2119. I fancy the answer there would be, would it not, that the person who has acquired a title by virtue of your registration is protected, and the aggrieved creditor will have to seek what remedy he can against the trustee personally, and the trustee personally has given a guarantee bond, so eventually an insurance company pays out. That is not an unsatisfactory position from anybody's point of view, is it? - No.
2120. What you would like, then, is some provision that as far as you are concerned you can safely act on a certificate by the trustee or something of that kind, that the committee of inspection have given permission for the transaction? - We would not want to go quite as far as that. We would be happy not to have a certificate from the trustee himself but merely a copy of the consent, or something of that kind.
2121. That again would be dependent ultimately on the good faith of the trustee? - Yes.
2122. I understand that after the 1947 case the question of making new Rules was considered by the Department and deliberately rejected owing to the amount of work it would involve for comparatively small results. In view of that I very much doubt myself whether it would be worth our while to recommend any new Rules. We cannot do more than recommend. - True. It is not a point that really concerns us; we merely thought, here is a provision under the Bankruptcy Act to provide for re-registration, but no Rules making provision for re-registration.
2123. No, it is a very odd lacuna. Supposing a trustee in bankruptcy purports to re-register in the Land Charges Department? - I should not question the application, I should accept it. I have no right to question it. And deliberately there has been imported a Rule which exempts me from having to enquire as to the correctness of any application that is submitted to me.
2124. You do not think, then, that it would be desirable to provide that they shall not be taken on re-registration? - I should have thought it much better to leave things as they are.
2125. Yes, but logically if you cannot re-register because you have not got Rules, then there seems little point in the Land Charges Act making provision for it? At the moment it is rather like a grandfather clock which nobody winds up, consequently it does not go, that is the position at the moment. - It is possible that we may be bringing in legislation to amend the Land Charges Act in the course of the next two or three years, and in that event if the Board of Trade would like us to take out that provision about re-registration, so far as it relates to bankruptcy matters, we could possibly do so.
2126. You are contemplating legislation within the next two or three years, are you? - It is really for the Lord Chancellor's Department to say, but we have got two reports to deal with, the report of the Local Land Charges Committee and the report of the Roxburgh Committee, and there are one or two other items we would like to handle and if we can legislate within the next two or three years we should all be happier than leaving it to go on and on.
2127. The last point you make is whether a trustee ought to be under an obligation to register his title. We are dealing here with registered lands, are we not? - Yes.
2128. What is to happen if, being put under that obligation, he fails to carry it out? - I do not think that really matters. - (Mr. Waterer): He will be protected still under Section 61(5).
2129. Of the Land Registration Act? - Yes. That always operate as a safeguard, on the assumption that an inhibition is on the register, as it always will be in an instance like that.

2130. The trustee might of course, especially in the case of after acquired property, be quite unaware that the bankrupt was registered as the proprietor of some registered land? - (Sir George Curtis): He might, yes.

2131. The person who is really going to benefit, if your proposal is carried out, is the purchaser's solicitor, is it not? He will be saved the trouble and expense of making the ordinary search in bankruptcy. - No, there will not be any search in bankruptcy. The purchaser's solicitor is covered by the existing provision of the Land Registration Act, which is in Section 110(5). That provides that where the vendor is not himself registered as proprietor of the land - and this would be the trustee - "he shall at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or" - and this of course would not apply in this particular case - "procure a disposition from the proprietor to the purchaser". In other words, the trustee, when he does want to realise, has got to go through the motions of getting himself registered.

2132. Or making the bankrupt sign the conveyance? - No, "or procure a disposition from the proprietor to the purchaser". You see Section 61(5) provides that the bankrupt is not the proprietor; it has got to be the trustee.

2133. Then when he wants to sell the land he has to get himself registered? - Yes.

2134. That is not an unsatisfactory position as it is, is it? - No, but we think that the register would be much clearer - this is perhaps just perfectionism - we think the register would be much clearer if instead of contenting himself with leaving his position safeguarded by the bankruptcy inhibition the trustee at that time procured himself to be registered. It costs no more, and there you have got a nice clear picture on the register. - (Mr. Waterer): The register would then tell you who the proprietor is, whereas with merely an inhibition you do not know who the proprietor is.

2135. You are merely put on your enquiry? - Yes.

2136. The whole object of the exercise as regards land registration is that the register should tell you who the proprietor really is? - (Sir George Curtis): Exactly, yes.

2137. Mr. Peirce: Would it cause any delay? - No.

2138. Chairman: Would it cost anything? - It costs 1s. per cent. on the value of the land, with a maximum fee of £2. But you have got to pay that when you come to realise the property.

2139. If he does not register and then realises the land he has only put off the evil day, he has still got to pay the £2 himself? - Quite, certainly.

2140. Mr. Emerson: Would there be any penalty suggested if the trustee omitted to do so? - No.

2141. Is he going to lose any rights, or anything like that? - No.

2142. Chairman: Supposing we made it the trustee's duty to register his title to registered land, when he knows it, and supposing he fails to carry out his duty and relies on the protection given to him by a bankruptcy inhibition, can any damage flow from his doing so? - No.

2143. I should not have thought so, so long as the inhibition is there. - Quite so. The inhibition is there for ever. We do not take it off the register of title. But I would have thought myself that complying with an obligation to procure his own registration would bring home to the trustee the fact that there was registered property belonging to the

bankrupt in regard to which he ought to have some evidence of the bankrupt's having acquired that property and its vesting in him, the trustee, and that he should have a land certificate, or at any rate know that there is a charge certificate outstanding in respect of that property. You see, at the moment the entering on the register of either a creditors' notice on the occasion of the petition or of a bankruptcy inhibition when the receiving order is made is done entirely of my motion. There is no intervention by the trustee then. The trustee of course does not appear on the scene until the adjudication. Therefore nothing I have done on the register brings home to the trustee that there is this registered property available; he has got to find that out in some other way. When he has found it out surely he ought then to take action to put himself on the register.

2144. Mr. Lloyd Williams: Then suppose in fact a bankruptcy is annulled because a debtor pays his debts in full, he has now got to go through all the machinery of getting himself back on the register? - We have dealt with that point. If in fact the bankruptcy were annulled then there could be a re-vesting in the bankrupt, or whoever else was entitled to the property.

2145. On payment of further fee? - Yes, there would be another 1s. per cent, I am afraid. - (Mr. Waterer): You still pay for cancelling an inhibition. - (Sir George Curtis): You have got your inhibition and your creditors' notice on the register, and if you produce evidence to me showing that they should be cancelled I shall charge you a fee for perusing that evidence and cancelling them, which would be 10s. each of those entries, and 10s. will cover £1,000 worth of property.

2146. So really there is not a lot in it? - No.

2147. Chairman: It does seem rather like Matilda's Aunt and the Fire Brigade - "Even then she had to pay, to get the men to go away". - I am fond of telling solicitors who object to my fees that the Land Registry is not an eleemosynary organisation.

2148. I have nothing more I wanted to ask you, Sir George, and I do not think we need take up any more of your valuable time. Thank you very much.

(The witnesses withdrew)

Monday, 8th October, 1956

Present

HIS HONOUR JUDGE BLADEN (Chairman)

MR. H. BEER, C.B.

MR. C.E.M. EMMERSON, F.C.A.

MR. H.E. FRITCE, O.B.E., J.P.

MR. B.E.P. MACTAVISH

MR. C. ROY WATERER, I.S.O.

} Joint

} Secretaries

MEMORANDUM SUBMITTED BY THE ASSOCIATION OF BRITISH CHAMBERS OF COMMERCEBANKRUPTCY LAW AMENDMENT

The Association of British Chambers of Commerce, after considering the terms of reference of your Committee, wishes to submit the following evidence.

The Association of British Chambers of Commerce considers that statutory complexity is to be deprecated. Such complexity can be caused by relevant provisions being in different statutes or in different parts of the same statute or by obscure draftsmanship. It is accordingly recommended, firstly, that at this stage, when it is proposed that various aspects of English law relating to bankruptcy and deeds of arrangement be altered, the opportunity should be taken to consolidate all the relevant statutory provisions into one statute. Secondly, it is urged that, when this is undertaken, attention should be drawn to the need to keep associated subjects together where this is practicable. Thirdly, the draftsmen should strive for the simplicity and lucidity of exposition achieved by such Acts as the Partnership Act, 1890, the Sale of Goods Act, 1893, and the Bankruptcy Act, 1914; this last point is intended not as a criticism of the language of subsequent Bankruptcy Acts but rather of much recent legislation (particularly Finance Acts), the complexity of which the Association would not wish to see repeated in a statute consolidating provisions relating to bankruptcy and deeds of arrangement.

MATTERS UPON WHICH EVIDENCE WAS PARTICULARLY REQUESTED1. Discharge

The Association is convinced that it is important to retain the status, obloquy and restrictions of the undischarged bankrupt.

Since the Bankruptcy Act of 1914 was passed, there has been a marked and increasing tendency for traders to carry on in business as limited companies. There are very few cases now of sole traders or partners who have been driven into bankruptcy by circumstances beyond their control. The causes of bankruptcy to-day are in many cases not the same as when the Act of 1914 was drafted: almost invariably bankruptcy is now an indication of some serious falling on the part of the trader. Some bankruptcies arise out of the bankrupt's own fraud or default, some through serious error of judgement on the part of the bankrupt and a very few bankrupts have had bankruptcies thrust upon them through no fault of their own. The majority are responsible for their own bankruptcy and are a serious danger to trade. Those of whom it may be said that they were not responsible for their own bankruptcy, have in any case caused their creditors to suffer harm.

The Association therefore considers that it would be unwise to adopt the proposal that there should be an automatic discharge of bankrupts, particularly after such a short interval as two years, as has been suggested

It is agreed, however, that the large number of undischarged bankrupts that exist is itself a danger to the trading community. The fact that only one in five bankrupts applies for his discharge indicates that the present procedure has probably led to bankrupts failing to obtain the discharge to which they are entitled. It is necessary, therefore, to alter the existing procedure in order to give reality to the status of being an undischarged bankrupt.

The proposal which the Association would make may be contrasted with the scheme under the consideration of your Committee, as follows:-

Discharge Procedure

<u>Scheme under consideration</u>	<u>Association's proposal</u>
Discharge automatic	Discharge only on application of bankrupt
After two years from Public Examination	After five years from Public Examination
Unless a caveat is entered at the conclusion of the Public Examination	Unless a caveat is entered at any time within the period of five years
By the Official Receiver	By the Official Receiver
Any creditor who was present at the Public Examination	Any creditor
The Court	The Court
	The Trustee in Bankruptcy

In more detail the Association's proposals are as follows:-

- (i) The Association considers that the period of two years suggested to the Board of Trade for automatic discharge is far too short. A more satisfactory period would be five years.
- (ii) The Association does not agree to the proposal that the onus of applying for a discharge should be removed from the bankrupt. It is suggested that at the end of five years after the conclusion of the Public Examination of the Bankrupt, every bankrupt would be able to apply to a Registrar in Chambers asking for a discharge. That discharge would then become automatic unless a caveat was entered against him on the Court File on the application of the Official Receiver, the Trustee in bankruptcy, or a creditor, or on the initiative of the Court.
- (iii) The conclusion of the Public Examination should not be the only occasion at which a caveat may be filed. It should be possible to lodge a caveat at any time within the suggested period of five years. This suggested amendment is to ensure that should any further facts come to light subsequent to the Public Examination or should the conduct of the debtor during the course of his bankruptcy subsequent to the Public Examination indicate that he is not entitled to a discharge, there will be procedure for preventing him from obtaining an automatic discharge on his application to the Registrar.
- (iv) If a caveat were entered, the Registrar would consider the general circumstances (in accordance with the scheme under consideration by your Committee) and would decide whether the discharge should be granted. If no caveat were entered, the Registrar would automatically grant discharge.

- (v) If discharge were refused, it is agreed that proposal (c) of the scheme under consideration by your Committee should be implemented. This proposal was that any bankrupt whose discharge had been refused should be required to keep the Official Receiver informed of all changes of address, to account to the Official Receiver at the end of every six months as to all his financial transactions and any after-acquired property or earnings and to attend upon the Official Receiver when required. It is considered important that this greater control should be exercised over the bankrupts whose discharge had been refused by giving the Official Receiver power to obtain this information. It should be possible for the Official Receiver to use this greater control more and more effectively as the number of undischarged bankrupts decreases.
- (vi) If the discharge were refused, subsequent applications by the bankrupts would be dealt with under the existing Section 26 procedure.
- (vii) It is agreed that a bankrupt should be entitled to apply for a discharge before five years, under the present Section 26 procedure. This method would probably only be used in the future when the bankrupt had special reasons for an early discharge.
- (viii) It is understood that at present there are about 60,000 undischarged bankrupts and it is agreed that special provisions are necessary to reduce this figure at the time when new legislation is passed. It is recommended:-

that there should be automatic discharge of all bankrupts where the date of the adjudication order was prior to, say, January 1st, 1951. In such cases, however, there should be adequate advertisement of the proposed discharge so that creditors would be given the opportunity of entering a caveat;

that this procedure should not come into effect until six months after the passing of the proposed legislation;

that during this interval of six months, it should be possible for caveats to be entered in accordance with the procedure set out in sub-paragraph (iv) above.

This procedure would provide some safeguard against the automatic discharge of bankrupts who have had an exceedingly bad record.

- (ix) The grounds upon which a caveat might be lodged would relate generally to unsatisfactory conduct of the bankrupt. The Board of Trade may find it possible to define this more exactly.

2. Second and Subsequent Bankruptcy

"In relation to a second or subsequent bankruptcy where the bankrupt remains undischarged from a previous bankruptcy, whether assets acquired by the bankrupt after his previous bankruptcy should be applied in discharging the debts owing to creditors in the second or subsequent bankruptcy in priority to any debts remaining owing in the prior bankruptcy."

No evidence has been received from Chambers that there is acute objection to the present procedure. It is difficult to legislate for fairness in all circumstances. The Association recommends, therefore, that the existing procedure be retained.

3. Monetary Limits

"The desirability of increasing the monetary limits prescribed by the Bankruptcy Acts so as to take account of the fall in the value of money, particularly those relating to a petitioning creditor's debt and to the estimated value of assets to enable an Order for Summary Administration to be obtained from the Court."

- (a) The liability to be made bankrupt. Bankruptcy Act, 1914, S. 4(1) (a)

It is wished to see the £50 limit retained. If this limit were increased the "professional" bankrupt would be encouraged.

- (b) Tools of trade, etc. Bankruptcy Act, 1914, S. 38(2)

The £20 limit of articles which do not vest in the trustee should be amended to comply with present day values. It is suggested that the monetary limit be £100 and that essential household furniture should be included, as well as tools and bedding.

- (c) The execution creditor. Bankruptcy Act, 1914, S. 41(2)

The Association does not recommend any change.

- (d) Summary administration. Bankruptcy Act, 1914, S. 185(a)

To comply with present day values it is suggested that the figure of £300 be increased to £500.

- (e) The £10 credit. Bankruptcy Act, 1914, S. 155(a)

The Association does not recommend any change.

4. After Acquired Property

"The advisability of limiting the vesting of after acquired property to such property as may be claimed by the trustees."

Although the present position bristles with legal difficulties, new limitations would involve many problems.

A bona fide purchaser for value is protected at the moment and the system is working satisfactorily. The Association accordingly recommends no change.

5. Appointment of Official Receiver in non-summary cases

"Whether creditors should be able to appoint the Official Receiver as trustee in a non-summary case."

The Association considers that creditors should be allowed to appoint anyone they may wish as a trustee in a non-summary case. This proposal is accordingly supported.

6. Revesting of Surplus Property

"Whether provisions should be made for a conclusion of the bankruptcy where the debts are paid in full (with statutory interest) and a revesting of the surplus in the bankrupt without the necessity for any documentary transfer by the trustee".

The Association considers that it is necessary to clear the title to property, in particular to Real and Leasehold Property. It is accordingly proposed that provision should be made that where debts are paid in full (with statutory interest) the bankruptcy be concluded. It should be made clear that the surplus will revert in the bankrupt by means of a Court vesting order, with a schedule listing the property and that this instrument be used in all such cases.

7. Appropriation of portion of remuneration

"The enlargement of the provisions of Section 51 of the Bankruptcy Act, 1914, to cover all kinds of earnings including the wages of workmen."

The Association considers that there is no logic in restricting the scope of Section 54 to salaries. It is accordingly recommended that this provision should be extended to include all kinds of earnings including wages.

8. Prosecutions

"An amendment whereby all prosecutions for offences under the Bankruptcy Acts may be instituted and carried on by the Board of Trade in lieu of the Director of Public Prosecutions."

The Association would be in favour of the Board of Trade instituting and carrying on prosecutions in lieu of the Director of Public Prosecutions. The Board of Trade should use this power fully.

The final question of the Board of Trade relating to Deeds of Arrangement is dealt with in Paragraphs 22 - 23 below.

ADDITIONAL AMENDMENTS IN RESPECT OF THE BANKRUPTCY ACTS

The Association desires to put forward the following further suggestions on Bankruptcy procedure:

9. Vacancies on Committee of Inspection

In relation to the existing Section 20(8) it is considered that the procedure as regards the filling of vacancies on a Committee of Inspection should incorporate a provision similar to S. 253(7) and (8) in the Companies Act, 1948, by which power is given for an application to be made to the Court (or to the Board of Trade) to waive the filling of a vacancy. Until a vacancy be filled or if a vacancy is waived, the existing members of the Committee should have power to Act.

10. Discharge

Under Section 26(3) (a) of the Bankruptcy Act where the bankrupt's assets are less than one half of his unsecured liabilities and he cannot disprove his responsibility for this, the Court is restricted from granting an absolute discharge. It is considered that ten shillings in the pound is too high and that a more appropriate figure would be 6/8d. in the pound.

11. Notice of Application for Discharge

Under Section 26(7), notice of the appointment by the Court of the day for hearing the application for discharge is published and sent to each creditor. It is considered that such notice should also be sent to the Trustee, whether or not he has received his release.

12. Preferential Claims

In relation to the existing Section 33(1)(a), it is considered that the priority of the Inland Revenue should continue to be related to one year of assessment but that the option of the Revenue to choose the year should be limited to one or other of the two years of assessment immediately preceding the Adjudicating Order.

A landlord's right to distrain at present continues after the commencement of bankruptcy, in respect of rent accrued within the six months prior to the Adjudication Order. It is considered that the landlord's rights should be reviewed generally and that the power of distress for rent due from the bankrupt should cease when a Receiving Order is made. The landlord would thereafter be dealt with as an unsecured creditor, in the same manner as an execution creditor who has not completed his execution. Claims for rent in respect of occupation by the Official Receiver or the Trustee would, however, continue to be enforceable by distress.

13. Postponement of Claims

In relation to the existing Sections 36(2) and (3), the postponement of the husband's and the wife's claims in respect of the other's bankruptcy, where money or other estate has been lent, should be extended to include money advanced to a partnership of which the husband or wife is a partner.

14. Reputed Ownership

The provisions of Section 38(2)(c) concerning goods in the order of disposition of the bankrupt were devised before hire purchase facilities were widely used and when the present methods of checking on a debtor's ability to pay for goods purchased on credit were not available. It is considered that the position has now changed, making these provisions obsolete and it should be made clear that goods coming under hire purchase agreements and other hire agreements are not included in reputed ownership.

15. Avoidance of Preferences

Under Section 44, a payment to a creditor can be avoided if it is made with a view to giving a surety or guarantor a preference, and, as the law stands, although the intention is to prefer the surety or guarantor it is the creditor who suffers through having to make repayment to the trustee. The primary responsibility to refund the amount of the preference should be on the shoulders of the surety or guarantor, so that the creditor in such cases will only be liable if the guarantor or surety cannot pay.

16. Costs

When a County Court Judge makes a Receiving Order under Section 107(4), the petitioning creditor is required to pay costs of £13.10.-. This provision may be one of the reasons why this procedure is so little used and it is suggested that the Judge should have power to order that these costs should be a first charge on the bankrupt's assets or future earnings.

17. Proxies

(a) The provision that proxies should be in the handwriting of the person giving the proxy or of a manager or clerk is out of date. Type-written documents should be accepted.

(b) In regard to the existing clause 18 of the First Schedule, it is considered that it should be amended to enable any person to become a proxy, as in the Companies Act, 1948.

18. Time Limits for lodging documents

With regard to the Bankruptcy Rules, it is considered that the time limits for lodgement of documents, accounts, etc., by the trustee are unrealistic and should be extended.

19. Audit

It is considered that the rule specifying that it is the duty of the trustee to convene periodical meetings of the Committee of Inspection to audit the cash book and the trading account is not necessary having regard to the detailed examination which is carried out by the Board of Trade every six months. The accounts should, however, still be laid before the Committee of Inspection.

20. Tenancies

The Association wishes to draw the Committee's attention to the anomaly that under present law the "contractual tenant" of a dwelling house, who goes bankrupt, loses his right of living in the house but a "statutory tenant" of a dwelling house, who goes bankrupt, will not lose his right to continue to reside in the house.

21. Forms

It is recommended that the forms used in bankruptcy administration should be simplified, so that they are both easier to understand and do not create duplication of work.

DEEDS OF ARRANGEMENT

22. Your Committee desired that evidence should be given on the following matter:-

"With regard to Deeds of Arrangement, what provisions are desirable in order that there may be a more effective control by the Board of Trade over the administration of assets vested in a trustee under a Deed of Arrangement."

The Association considers that tighter control by the Board of Trade is not required over the administration of assets under a Deed of Arrangement. The Deed of Arrangement is voluntarily entered into by the creditors and it should be presumed that they have accepted a trustee whom they considered satisfactory. It is noted that the number of Deeds of Arrangement is falling. In 1938, there were 1,663, whereas in 1953, only 302. Deeds of Arrangement are useful to the commercial community and it is not desirable to impart new complexities but rather to make the present procedure more workable.

ADDITIONAL AMENDMENTS IN RESPECT OF THE DEEDS OF ARRANGEMENT ACT

23. The Association considers that the law relating to Deeds of Arrangement should be consolidated into a new statute with the following alterations:-

Under the existing Section 1

It is important that the creditors should know to what they are assenting. In practice they very often do not. Therefore, the following amendments should be made:-

(a) A specimen Deed of Assignment be scheduled (following the procedure of Table A in the First Schedule of the Companies Act, 1948).

(b) All assent forms sent out in relation to a Deed of Assignment should set out clearly the variations from scheduled Deed of Assignment.

Under the existing Section 2

Under the existing law, the Deed has to be registered within seven days. This time limit is considered too short. It should be increased to fourteen days.

Under the existing Section 3

The majority required to validate a Deed should remain at 50% of the number and value but if 75% in value and 20% in number agree, it shall be binding on all creditors, provided that a non-assenting creditor shall have a right of appeal to the Court within twenty-one days of its execution being notified to the creditors.

Under the existing Section 16

At the expiration of six months from the date of the payment of the final dividend, the trustee must pay unclaimed dividends and undistributed funds in his hands to the Board of Trade.

Mr. Bertram Nelson, C.B.E., J.P., F.S.A.A.	} Representing the Association of British Chambers of Commerce
Mr. Norman Henry Brown	
Mr. Richard Augustus Palmer, T.D., J.P., M.A., F.C.A.	
Mr. Peter Brian Allnatt, L.L.B.	

Called and examined

2149. Chairman: Gentlemen, we have all read your memorandum and I am quite sure we should all agree with you that statutory complexity is to be deprecated. I see that the first thing you desire in any new Act is that all the matters we are considering should be concentrated in one Act. Do you really want one Act and not two? - (Mr. Nelson): Our submission is that bankruptcy laws should be consolidated into one statute and that the law relating to deeds of arrangement should also be consolidated, not necessarily in the same statute.

2150. You suggest that bankruptcy law and company law should be assimilated. That would mean that at present, of course, our recommendations would have to be in the direction of making bankruptcy law follow the existing provisions of the Companies Act? - We agree. Our desire is for a general process of co-ordination and a gradual process of coming together.

2151. I suppose you would agree it cannot be more than an approximation. There are some elements in the one inapplicable to the other. - Yes.

2152. That brings us to the matter of discharge. Can you give us any reasons for your view that bankruptcy nowadays is generally, if not always, a worse matter than it used to be, say, before the war? - I would rather put it this way, that we feel the position is not so good that the obloquy which is attached to bankruptcy should be withdrawn. Any undue revision of that status might be undesirable in commercial matters.

2153. But do you think there are fewer so to speak innocent bankruptcies now than there used to be? - (Mr. Palmer): I find it is exceptional to come across an innocent bankrupt; perhaps not more than one in ten.

2154. What do you think the proportion was, say, ten years ago? - At that time my experience was fairly limited, but I think it was more than common to come across people who were relatively innocent, or where bankruptcy had developed through causes beyond their control.

2155. Perhaps we ought to go back a little further. What do you think the position was, say, just before the war as regards the number of comparatively innocent bankrupts? - I should say they were more prevalent. You found more innocent cases of bankruptcy than you do today. I find it difficult to give you a percentage figure.

2156. Of course, you cannot give it exactly. - It is just a general impression.

2157. Mr. Peirce: You refer to the "professional" bankrupt a little later in your memorandum. I was rather puzzled as to what was the difference between the bankrupt referred to in the first part and the "professional" bankrupt referred to in the latter part. - The "professional" bankrupt is the bankrupt who is prepared to disregard his creditors' interests, perhaps being a bankrupt more than once.

2158. I should think the more villainous man formed himself into a company and put the letters "Ltd" after his name. - (Mr. Nelson): I expect that is so in many cases, but of course in the bankruptcy cases you get personal extravagance.

2159. Chairman: I appreciate that a company cannot be guilty of personal extravagance. I think the matter we are differing about at the moment is this period of two years, which you think is far too short. I do not know if you had the statistics of the number of discharges granted subject to a suspension of less than one year? - (Mr. Brown): No.

2160. It might surprise you to know that in 1954, of the 274 discharges granted by the Court, 190 were granted subject to a suspension of less than one year from the date of the order. I am confining myself to cases where a suspension order was made. In 1955 the figures were 345 and 263. - That is no indication as to how long those orders were from the date of the public examination. Those cases, of course, are only a percentage of cases in which applications have been made.

2161. The sort of chap who does not apply for discharge is very often a rogue. Have you seen document B/A/112 setting out an amended scheme for discharge? - (Mr. Nelson): Yes, we have been considering it.

2162. That does go some way to meet your points, does it not? - In regard to the time limit mentioned it seems to us that perhaps three years might be appropriate.

2163. If you take the revised scheme and substitute three years for two, you will not quarrel with it? - We would be happy with paragraphs A and B. We however suggest, under sub-paragraph A 2, that any creditor, in addition to the Official Receiver and the trustee, should have the power to apply for a caveat.

2164. Do you think that is really necessary? After all, the creditor if he wants to can always jog the elbow of the Official Receiver to remind him it was a bad case? - It might also be desirable to leave the creditors free to apply for caveats.

2165. At a pinch he can always agree to indemnify the Official Receiver and get an order permitting him to use the Official Receiver's name. - I think our feeling was that giving the creditor some additional right might make the experiment more palatable.

2166. Your suggestion comes to this, the three year period plus the right to the creditor to apply for a caveat during that period. I think I ought to tell you we were considering including in paragraph A 1, which sets out the people to whom the scheme will not apply, the bankrupt who has been convicted of some offence in relation to his bankruptcy. - That will be very helpful. In relation to paragraph B 1, we felt there again the creditor might have the right to apply for a caveat and that in cases of future bankruptcies there should be an application by the debtor before he could obtain his discharge. It should not be an automatic procedure.

2167. I do not quite understand your views about that. You want him to make an application as he does now? - I think the reason for that goes back to the original principle, that to remove the obloquy of bankruptcy too quickly might be disadvantageous. If in the future it could be regarded as automatic that after two or three years the bankrupt gets a discharge, then there might be people less concerned about being made bankrupt.

2168. Then you get exactly the same trouble we have today, do you not, that a lot of them do not apply? - (Mr. Palmer): I think it was rather strange that this particular point was brought out by a majority of the Chambers. They were not unanimous, but a majority felt that automatic discharge was undesirable.

2169. If you do not provide automatic discharge for the comparatively innocent bankrupt against whom no caveat is entered, you are going to have all this trouble again, are you not, of the number of undischarged bankrupts piling up? - (Mr. Nelson): I think there might perhaps be some reduction for a special reason. Many honest undischarged bankrupts hesitate to apply now because they think there will be a great deal of publicity.

2170. You are proposing the application to be in Chambers, I see. - If they knew they could apply without publicity, I think the number of applications would increase very rapidly.
2171. They have got to face the fact the discharge would be gazetted. It seems to me that, if the discharge is to be a matter that ensues as a matter of course at the expiry of a certain period, and yet the man has to apply, it is rather like a man being sentenced to fifteen years for burglary and then having to make an application to the governor of the prison before he is released. - I think it goes back to the anxiety the Chambers have expressed to us that there should not be too speedy a removal of the obloquy attached to bankruptcy.
2172. It is really a matter of deciding what the proper period is, is it not? - I think the feeling of the Chambers was that an automatic discharge without any action on the debtor's part went too far in removing obloquy. - (Mr. Brown): I think they felt it would make it look as if bankruptcy was not such a serious matter as it is now because there was an automatic discharge.
2173. If the discharge is refused, or even if the man is put under a caveat, he is put under very onerous duties. You suggest, I see, prosecution if he fails to perform those duties. We thought the remedy for failing to discharge those duties should be committal, which is after all a more summary and expeditious manner of dealing with it. - (Mr. Palmer): Yes, I would agree with that.
2174. You mention that possibly during your suggested five year period a man could apply for a discharge under the proposed scheme. - (Mr. Nelson): We felt the rights under Section 26 should be preserved.
2175. Now you have seen HLA/112, which shows the scheme in its modified form, I do not know if there is anything more you want to say about the discharge problem? I think we have pretty well covered the ground. - Yes.
2176. That brings us to second and subsequent bankruptcies. You are satisfied with the present position, is that right? - I think perhaps it is fair to say we think any change might bring new complications. So far as the evidence from Chambers carries us, it is felt that it is very difficult to get fairness in all circumstances and we therefore get no strong views in favour of change. - (Mr. Palmer): One view that was expressed in favour of the existing position being retained was that creditors dealing with a bankrupt have the opportunity of discovering his status if they take the trouble to find out. In the case of the first bankruptcy there is no such opportunity. That is the main reason why it was thought the first creditors were just as entitled to subsequently acquired assets as those who were foolish and negligent in not discovering the status of that bankrupt.
2177. We have had that put up before. Is not the trouble this, that the man is not in any way labelled or branded and one cannot tell that he is bankrupt. Is it practicable, before dealing with any man, to find out whether he is an undischarged bankrupt? - (Mr. Nelson): It is customary to get a trade protection society report or to take up trade references. There is opportunity for finding out about the real status of the debtor in such circumstances. - (Mr. Palmer): We wondered whether any time limit might possibly be provided in those cases, that after, say, a period of five years the former bankruptcy ceased to count. But we decided it would be rather confusing.
2178. And it would not serve any useful purpose if the automatic discharge scheme went through? - So we decided to stand on this.
2179. One suggestion that has been made to us was that the assets in the second bankruptcy should be used first in paying to the second lot of creditors a dividend equal to that paid to the first lot, and thereafter the

assets should be divided equally between both lots. - (Mr. Brown): That would seem a very reasonable suggestion.

2180. There are great practical difficulties about it. There is either this scheme, or the one postponing the first creditors completely to the second, or "no change". There are those three alternatives. - (Mr. Nelson): We considered those and felt the third might be inevitable.

2181. One of the difficulties at the moment is that the prospect of putting a man into bankruptcy a second time is very unattractive when you know the vast majority of the existing assets would be collared by the previous creditors. I think it very much tends to make creditors fight shy of taking steps to make him bankrupt a second time, so he may get away with a great deal he does not deserve to get away with. If it could be made more attractive to the second lot of creditors it might have an effect. - (Mr. Palmer): I think that is true.

2182. As you say, the £20 figure in Section 38 (2) is quite ridiculous at the present time. You suggest £100. What would you think about abolishing that monetary limit altogether? - I think it is a good guide to have that. Even the present limit is never really adhered to strictly.

2183. No, it is not. We thought the great advantage of some measure of elasticity would be that the trustee and Official Receiver could deal specially with special cases. After all, what is necessary for a bachelor is much less than would be necessary for a married man with a large family. You still think you would rather have some limit? - (Mr. Brown): The Chambers are pretty keen on having some limit on this. - (Mr. Nelson): We price the necessities of life of the average individual at about £100.

2184. I see you do not want to change the monetary limit in Section 41(2). As a matter of fact we hope to simplify those two Sections, 40 and 41, and to make it unnecessary to have a £20 limit at that point. I take it you would support any simplification? - Yes.

2185. I see you want to put up the ceiling of summary administration to £500. Do you think that is enough? Most people seem to favour £1,000. - I have no strong views on that point. - (Mr. Palmer): I do feel £1,000 would be too high. My experience is that the Official Receiver generally speaking is rather glad to hand out small cases.

2186. I suppose he is. We have a good deal of evidence to show that there is precious little meat on the bone for the professional trustee. - I think there may be some substance in that.

2187. Under after acquired property, I see you speak of new limitations there, but we were not proposing to make any new limitations. We were proposing to restore the position to what it was originally thought to be. The trustee may at any moment be saddled with after acquired white elephants. - (Mr. Brown): There were no strong views on this from Chambers at all.

2188. Broadly speaking you say your constituent Chambers are of an open mind about this? - Possibly having had not much experience of it.

2189. As to the Official Receiver acting in non-summary cases, it does not very much matter whether the creditors can actually appoint him as long as there is machinery by which if they want him they can get him? - We would agree.

2190. We thought of doing it by substituting "may" for "shall" in the material Section, so that it would specifically permit the Board of Trade to do as they do at the moment? - (Mr. Nelson): We quite agree.

2191. That would be quite satisfactory to you, would it not? - Yes.

2192. I do not quite understand why, as regards surplus property where payment in full takes place, you think there should be a schedule setting out the property involved. Would it not be enough if there was a Court order referring to all property? - (Mr. Brown): We thought the difficulty on that arose on title to real and leasehold property where the property had vested in the Official Receiver or trustee on the adjudication order, and it would be necessary to know on future investigation of that title whether that property had re-vested or not. I have been thinking of this simply on an investigation of title basis as to whether one would be satisfied on that. I had come to the conclusion that one would not and one would require specific reference to the particular property.
2193. It would be only necessary in the case of land? - Yes.
2194. You would not want long lists of all the personal property? - It would be desirable in the case of land.
2195. We have made some proposals for amendments in regard to vacancies on the committee of inspection which I think pretty well meet your point. - (Mr. Nelson): Could I perhaps add one other matter - the appointment of a limited company to membership of the committee? We feel it might be advantageous if the principle could be clearly stated.
2196. In what sort of way? - So that a limited company can be appointed to a committee of inspection with power to appoint its representatives at a particular meeting, under the seal of the company.
2197. Would there be any harm in a company executing some sort of general instrument under its seal, appointing Mr. Robinson to act for it in all cases? - Mr. Robinson or Mr. Smith.
2198. It has been done. - The law is not clear.
2199. Do you attach much importance to reducing the figure 10s. in the £ for discharges to 6s. 8d.? - This was part, I think, of the general objective of getting rid of these cases more quickly.
2200. It is too high, is it? - (Mr. Palmer): It is unusual to find as much as 10s. being paid. - (Mr. Nelson): For a debtor 10s. is sometimes a very high objective whereas he might scrape together to try and get 6s. 8d.
2201. Actually we were thinking of cutting that provision out altogether. I was rather puzzled by your saying you thought the ex-trustee should be sent notice of an application for a discharge. Is a released trustee going to do anything about it if he gets such a notice? - (Mr. Palmer): He might have cause; he might have had experience of unsatisfactory conduct by the bankrupt even after the trustee has been released. In practice it is, I think, quite normal for the Official Receiver to send the ex-trustee notice of the occasion on which the bankrupt is going to apply to the Judge for his discharge.
2202. This will normally only arise where a caveat has been entered. While the caveat is there you may be quite sure the Official Receiver will be able to assist the Court and it will probably be hardly necessary to bother the released trustee. - (Mr. Nelson): Perhaps it is done as a matter of convenience. - (Mr. Palmer): I think in view of the caveat it is not so important. Some Official Receivers still do adhere to the practice of notifying released trustees. - (Mr. Nelson): It might give the ex-trustee an opportunity of an informal talk with the Official Receiver about any matters within his knowledge.
2203. It could not do any harm. - It is partly, I think, the general desire to keep the machinery flexible for the experimental period which would be necessary under new legislation. It would mean that the ex-trustee could pass on to the Official Receiver any matters within his personal knowledge.

2204. As regards the priority of Inland Revenue for taxes, I gather you are not happy about it. Very few people are. Your suggestion is to limit to one of the last two years which, in practice, would almost invariably mean the last year but one? - Yes.

2205. Assuming that some measure of priority ought to be given to them, we have had two proposals to consider and would be very grateful if you told us what you think would be the better. The first one is this, that if there should be a surplus after payment of all preferential creditors except the Inland Revenue, the assets to which the Inland Revenue can look for prior payment should be limited to a percentage - 50 per cent. is suggested - of the remaining assets, which would mean that in all cases, except where there is not enough to pay the other preferentials, there would always be something, however small, for the general body of creditors so that they would not altogether lose their interest in the administration. Now the other scheme - it might be possible to combine the two, though I hardly think it would - is this, that instead of having the choice of any year they like the Revenue should have to take the average of all the years in respect of which tax is outstanding. Thus, if there were four years in which the tax had become due and had not been paid, the limit of preferentials would be a quarter of the total amount due to the Inland Revenue; if there were only two years, it would be a half, and so on. That would not, of course, definitely ensure that in all cases there would be something for the unsecured creditors, but it would at least encourage the Inland Revenue to get on with it and not let the tax bill mount up. In other words, it is putting a premium on quick detection. - (Mr. Brown): From the point of view of the ordinary trader, the first method is desirable. It gives him something. - (Mr. Nelson): I agree with that view. - (Mr. Palmer): I agree with that, but my personal view would be the second.

2206. We have taken an awful lot of time and trouble over avoidance of so called fraudulent preferences. I think I can say substantially we have met your view, but do you consider that where there has been an intention to prefer a surety, and the surety has either absconded or himself become bankrupt by the time the trustee seeks to challenge a preference, that the principal creditor should be liable in such a case? - (Mr. Brown): I should think so, yes.

2207. It means for the principal creditor at the time of the transaction the risk that the failure of the surety falls on him and not on the trustee? - Yes, he has picked his own surety.

2208. Do you think that should apply equally where there is no personal liability of the surety and a deposit of securities? - I think it ought to apply equally. - (Mr. Nelson): The Chambers have no decided views on this point.

2209. It is a very difficult problem: one of two innocent persons must in the circumstances suffer. - I am afraid we cannot help you there. It is a very difficult problem.

2210. One thing we were proposing to recommend was that, subject to some protective clause as to payment for day to day necessities, all payments made in the last three weeks should be voidable irrespective of the debtor's intent to prefer. I do not know what your views about that would be? - I am afraid that would be rather too wide. It might catch some perfectly bona fide and honest transactions.

2211. What we felt was in point of fact most of the real preferences take place rather at the last moment. - It might produce uncertainty in commercial matters. The effects, while they might be advantageous in preventing undue preferences, might not be advantageous in relation to commercial matters generally. It should not be applicable to honest and bona fide transactions.

2212. The difficulty there, of course, is in the vast majority of preferences the person who gets the money is perfectly honest and a last minute payment is not necessarily dishonest even in the bankruptcy. The bankrupt

might give somebody a preference for a motive with which reasonable people would sympathise but it would still be a preference to which the Section applies. - My fear would be that the honest person dealing with one who was to become a bankrupt might be severely damaged by a sweeping clause of that character, but I agree that there would be advantages so far as undue preferences were concerned.

2213. He would only be put on the same level as everybody else. He has his right of proof for his original debt. It is only really putting the clock back those few weeks. - (Mr. Palmer): I would like to see it at 28 days.

2214. The difficulty really is to find words for the limitation clause, I think. - (Mr. Nelson): We would like to think about this subject with the actual wording of the suggested clause before us.

2215. Regarding the £13. 10. Od. in Section 107 payable when the County Court Judge makes a receiving order instead of a committal order, what we were proposing to recommend was that he could make the receiving order if he is satisfied that there are going to be enough assets to pay those costs. I think that meets your point, does it not, because it means that a creditor does not actually have to put his hand in his pocket or, perhaps, his pen to his cheque book, and write out a cheque for £13. 10. Od. - That would be very helpful.

2216. Then, if the proxy is to serve on the committee of inspection we think he should be in the regular employ of the creditors concerned. - Yes. On the subject of proxies could we perhaps mention two forms that we had in mind? (Witness produced two forms) That is the form used for proxies under the Companies Act, and that is the bankruptcy form. We find that many people have great difficulty in filling in this bankruptcy form.

2217. Well, forms strictly are outside our purview. We are only asked to make recommendations for amendments to the Acts. Speaking for myself I would approach the company form with a great deal more equanimity than I would the bankruptcy form. It looks about as horrifying as an income tax return. - We thought that perhaps it could be revised in the direction of the company form.

2218. We really cannot help you about matters in the Rules, such as the time for lodging documents, accounts and audit. They are outside our purview. - We had in mind one special time limit - the time limit for dealing with proofs by the trustee.

2219. That is in the Second Schedule, is it not? - No, in Rule 259.

2220. It is a Rule and not in the Schedule to the Act? - Second Schedule, paragraph 23, and Rule 259. The general point we had in mind was that the period of 28 days is so very short for the trustee to decide whether he should object to proof.

2221. We have altered that provisionally to two months. I think that is a more reasonable period, and we have brought it into the Act. I thought we had dealt with it, but I was not quite certain. Now, as regards tenancies, I think you very rightly describe the position as anomalous. To put it right you would have to reform the Rent Restriction Acts, and not the Bankruptcy Act, would you not? - (Mr. Brown): There is one way, by excluding from property vesting in the trustee a contractual tenancy of a dwelling house within the Rent Acts.

2222. I do not think you could do that. - It might be difficult to limit it to property within the Acts. It is an anomaly that probably cannot be helped.

2223. That brings us, I think, to deeds of arrangement. - (Mr. Nelson): Could I perhaps mention one final point?

2224. Yes, of course: by all means. - It is the question of a local bank account of a trustee. This is permitted at present where trading operations are going on. There might be certain advantages if all trustees were empowered to have a local banking account.
2225. Whether they are carrying on a trade or not? - Yes.
2226. Well, we can certainly consider that - (Mr. Palmer): It would save time.
2227. Not very much, would it? It does not take very long to get money out of the central account, does it? - No, it does not, really, but it would relieve the trustee of the necessity for making an application to pay out an account. It is just that another form could be cut out - and bankruptcy is full of forms.
2228. I notice you are keen on having a specimen deed of assignment scheduled to the Act. Now first of all, one specimen will not do, will it? You want several different types? - (Mr. Brown): According as to whether it is a composition or an assignment of all assets?
2229. I should have told you that we are proposing to recommend that documents which do not contemplate the passing of property to a trustee need not be registered. - That would be a very good amendment.
2230. You would register a deed of assignment or, say, a deed of inspectorship which contained a covenant to assign, but not a pure deed of inspectorship, or a letter of licence, or a pure composition. - I think it would be very helpful. - (Mr. Nelson): I agree.
2231. But even so I think you would want more than one specimen deed? - Possibly three.
2232. Yes, something of that sort. - I think our feeling was that you in fact now bought these forms from a legal stationers: they are in a common form and the creditor is entitled to have notice if an exceptional type were being used.
2233. So you would allow people to deviate from your model deeds, provided they announced what the deviations were, so that the creditors would know? - So that the creditor would know to what he was assenting.
2234. I know that creditors do in fact at the moment constantly assent, so to speak, in the dark but, if they are invited to assent to the deed, there is nothing to prevent them asking the person who invites them to assent, "Let me see a copy of the deed." It is very foolish of them not to, is it not? If they choose to buy a pig in a poke they have only themselves to blame - (Mr. Brown): Yes, but in most of these cases the stage is reached where they are getting very little out of it and would be thankful to see the end. - (Mr. Nelson): And the time limit is so short. There is not very much time to correspond with the trustee and for copies to be made. We did feel they were entitled to know, before consenting to a deed, whether there were exceptional clauses in it.
2235. Mr. Emerson: Would you say that the assent of the creditor is more to a particular trustee acting than to anything else? In other words, if the creditors had not confidence in the trustee they would not assent. - (Mr. Palmer): I think, practically speaking, that is the answer.
2236. So the form of the deed really is immaterial, if that is so? - (Mr. Nelson): But the creditors may not know the particular trustee.
2237. No, but they would know he was being nominated by the principal creditor or by the principal creditors. - They may only know that there has been a lot of bother, that this has been a troublesome case, and that this is the end of it; and they are not prepared to spend any more money.

2238. Chairman: I fancy what will happen will be that a creditor who does not know Mr. Snooks, who is the man who has been nominated, probably goes along to another creditor and says, "Do you know Snooks - what sort of a chap is he?" And the other chap says, "Oh, he is a frightfully good chap." And the creditor assents to the deed without any more ado. That is the sort of thing you get happening? - Yes.
2239. What is to happen if, by some probably quite innocent mistake, one of the deviations from the model form is not mentioned in a letter to the creditors - would that upset the whole applecart or, if not, what is to happen? - I would suggest giving power to the Court to provide a remedy.
2240. Could the creditor be declared bound, notwithstanding the omission? - (Mr. Palmer): If it was a material omission, I would say not; but it depends on the effect on the creditor.
2241. Mr. Emerson: Would you agree that in practice there might be difficulties attaching to a standard form of deed? - My own experience is that they are nearly all in a standard form. There is very little variation. - (Mr. Brown): I think there would be. - (Mr. Nelson): All I can say is that the members of the Chambers do at present feel they are being asked to assent to a document they do not know, and if there were some standard form, with notification of variations thereon, there would be great advantages in many cases. We appreciate that there are difficulties.
2242. Chairman: I do not quite understand your proposal under Section 3. Do you want to take away the right of a non-assenting creditor to appeal, apart altogether from a petition? - The non-assenting creditor would still have the right of appeal to the Court. Since our evidence was submitted, we have considered our figures again and feel that our figure of 20 per cent should be increased to 50 per cent, so that the majority required to make a deed binding on all creditors should be 75 per cent in value and 50 per cent in number.
2243. 75 per cent in value and 50 per cent in number? - And he should have the right of appeal to the Court for 21 days.
2244. What do you mean by that? Do you mean lodge a petition, treating it as an act of bankruptcy? - Yes.
2245. We were proposing to cut down the time for a dissenting creditor's petition to a month, which is remarkably near to your suggestion. You say 21 days and we say a month. That would help a lot? - Yes.
2246. We were also proposing - I do not know what you think about this - we were proposing to give the Court express power to dismiss a bankruptcy petition founded on a deed if it is, to put it in a word, a "blackmailing" petition, or if the Court is satisfied that the receiving order is not in the general interests of the general body of creditors. - We should like that.
2247. I have no further questions that I want to ask you myself. I do not know if you want to add anything to what you have already said, Gentlemen? - Simply to thank you, Sir.
2248. Then we need not take up more of your valuable time. Thank you for coming to see us.

(The witnesses withdrew)

Monday, 29th October, 1956

Present

HIS HONOUR JUDGE BLAGDEN (Chairman)
 MR. H. BEER, C.B.
 MR. C.E.M. EMMERSON, F.C.A.
 MR. H.B. FRICE, C.B.E., J.P.
 MR. B.E.P. MACTAVISH
 MR. C. ROY WATERER, I.S.O. } Joint Secretaries

MEMORANDUM SUBMITTED BY THE
COUNCIL OF THE LAW SOCIETY

Introduction

1. This Memorandum is submitted by the Council of The Law Society in response to an invitation from the Departmental Committee on Bankruptcy Law Amendment, set up under the Chairmanship of His Honour Judge Blagden, with the following terms of reference:-

"To consider and report what amendments are desirable in:-

(i) the Bankruptcy Acts, 1914 and 1926, more particularly in regard to the provisions relating to the discharge of bankrupts, and

(ii) the Deeds of Arrangement Act, 1914."

2. The observations which the Council have to offer are grouped into two main parts dealing with:-

(A) The particular matters upon which the Departmental Committee have asked for the views of the Council, including a scheme for discharge of bankrupts, and also Deeds of Arrangement.

(B) The Bankruptcy Acts, 1914 and 1926.

3. The Council wish to emphasise that the Sub-Committee responsible for drafting this Memorandum was largely composed of non-Council members with considerable experience of all aspects of bankruptcy law and practice; and numerous points raised by solicitors practising both in London and the Provinces were taken into account during preparation of the evidence.

A. THE PARTICULAR ISSUES RAISED BY THE
 DEPARTMENTAL COMMITTEE

The letter from the Departmental Committee inviting the Council to give evidence stated that the Committee were seeking evidence in particular upon nine points connected with their enquiry. These are given below with a statement of the Council's views upon each item:-

"1. Whether, and if so, how the Bankruptcy Acts should be amended in regard to the discharge of bankrupts. Comments on the scheme outlined in the attached Appendix would be particularly appreciated."

The Council approve the general principle underlying the scheme proposed by the Committee, but have certain comments to make on the detailed provisions of the scheme; it is therefore set out below, with the Council's reservations noted against particular paragraphs:-

"Scheme to ensure that the Discharge of every Bankrupt is considered by the Court

"(A) At the end of a certain period (two years is suggested) after the conclusion of the Public Examination of the bankrupt, every bankrupt would become automatically discharged unless a caveat were entered on the Court file against such automatic discharge."

No one would wish to prolong unnecessarily any of the comparatively few bankruptcies attributable to misfortune, but due regard should be paid to the interests of creditors who are always concerned with the possibility of a substantial recovery from after-acquired assets. The Council feel that, if the period of automatic discharge is made too short, then caveats would be put on very frequently and this would have the effect of stultifying the proposal for automatic discharge. Further, it would not be possible to apply any conditions to an automatic discharge. The Council consider the proposed period of two years is too short and think a five-year period would be preferable. It is always open to a debtor to apply for his discharge.

"(B) This caveat would be entered at the conclusion of the Public Examination on the application of the Official Receiver, or of any creditor who had proved his debt and was present; or on the initiative of the Court. The Registrar would take into account the evidence of the bankrupt, as given in his answers at his Public Examination, and upon hearing the applicant for the caveat thereon, would decide whether the bankrupt's conduct and financial dealings leading to his bankruptcy were such as to render it undesirable in the public interest that the automatic discharge should take effect. In that event, the Court would enter the caveat and at the same time fix a day, time and place for the hearing of the bankrupt's discharge."

The Council believe that the caveat should be available on application any time after the conclusion of the public examination and before discharge becomes effective, and the rule should be extended to permit an application by the trustee in bankruptcy. It should also be made clear that the creditor need not be present in person if he is properly represented at the public examination.

"(C) Any bankrupt whose discharge was refused by the Court would be required to keep the Official Receiver informed of all changes of address, to account to the Official Receiver at the end of every six months as to all his financial transactions and any after-acquired property or earnings and to attend upon the Official Receiver as and when required."

This paragraph should, the Council suggest, be amended by an addition at the beginning in the following terms: "Every bankrupt until his discharge should become effective, and (any bankrupt)..." and an addition at the end reading "(when required) and failure to do so without reasonable cause would be an offence under the Bankruptcy Acts."

"(D) If any bankrupt who had not a caveat entered against him were not satisfied to await the period when he became automatically discharged he would have the right to apply for an earlier discharge at any time after the conclusion of his Public Examination. In that event his application would be dealt with in the same manner as under the existing provisions of Section 26."

The Council endorse this suggestion.

"(E) Provision would be made for the automatic discharge of all existing undischarged bankrupts provided they had not been bankrupt on more than one occasion and the Court had not refused their discharge."

The Council feel that this proposal involves two considerations. First, it is desirable to put an end to a majority of the bankruptcies begun before the last war. Second, it is important to prevent dishonest debtors obtaining the benefit of automatic discharge by avoiding their public examinations and waiting for discharge to come automatically. In this connection it is pointed out that the caveat system under the scheme would probably not apply to old bankruptcies (i.e. those arising under the present Act), but it could be made to apply to all discharges in any event. The Council recommend accordingly that after "undischarged bankrupts" there should be inserted "who were adjudicated bankrupt before the 1st September, 1939, and whose Public Examinations had been concluded or otherwise dispensed with".

"2. In relation to a second or subsequent bankruptcy where the bankrupt remains undischarged from a previous bankruptcy, whether assets acquired by the bankrupt after his previous bankruptcy should be applied in discharging the debts owing to creditors in the second or subsequent bankruptcy in priority to any debts remaining owing in the prior bankruptcy."

The Council consider that this suggestion is unfair to creditors in a first or prior bankruptcy and are of opinion that the existing law as to priority of application of assets between bankruptcies is satisfactory, notwithstanding that the later assets may be created by the creditors in the subsequent bankruptcy.

"3. The desirability of increasing the monetary limits prescribed by the Bankruptcy Act so as to take account of the fall in the value of money, particularly those relating to a petitioning creditor's debt and to the estimated value of the assets to enable an Order for Summary Administration to be obtained from the Court."

The petitioning creditor's debt should be increased to £100 and the estimated value of assets leading to an Order for Summary Administration should be £750.

"4. The advisability of limiting the vesting of after-acquired property to such property as may be claimed by the trustees."

The Council oppose this suggestion, and prefer retention of the present rule under Section 38 of the Act of 1914 as explained in *Re Pascoe* (1944) Ch. 219.

"5. Whether creditors should be able to appoint the Official Receiver as trustee in a non-summary case."

Power should be given to enable creditors to do this.

"6. Whether provision should be made for a conclusion of the bankruptcy where the debts are paid in full (with statutory interest) and a re-vesting of the surplus in the bankrupt without the necessity for any documentary transfer by the trustee."

The Council agree with the general principle of clause (6) and are further of the opinion that the provision for conclusion of the bankruptcy should also permit automatic discharge on evidence of payment of debts in full with statutory interest, filed in Court upon the certificate of the Official Receiver. For the purposes of providing evidence of title and means of record, however, documentary transfer of surplus assets to the discharged bankrupt should be retained by way of vesting order of the Court or deed of conveyance or other instrument by the trustee in bankruptcy, at the option of the debtor.

"7. The enlargement of the provisions of Section 51 of the Bankruptcy Act, 1914, to cover all kinds of earnings including the wages of workmen."

"8. An amendment whereby all prosecutions for offences under the Bankruptcy Acts may be instituted and carried on by the Board of Trade in lieu of the Director of Public Prosecutions."

The Council support proposals 7 and 8.

"9. With regard to deeds of arrangement, what provisions are desirable in order that there may be a more effective control by the Board of Trade over the administration of assets vested in a trustee under a deed of arrangement."

It appears to the Council that improvement in control by the Board of Trade over the trust assets may be brought about in two ways. First, control over assets in the hands of a trustee of a deed of arrangement should be strengthened by giving the Board of Trade power to remove a trustee if the Board have reasonable cause to suspect misconduct by him. The Council think that the conferment of this reserve power is essential for effective control by the Board, and anticipate no risk of its abuse. Other possible safety measures which might be considered in this respect are (i) the abolition of the power of a majority in number and value of creditors to allow a trustee to dispense with giving security, and (ii) the imposition of a duty upon the trustee of a deed of arrangement to make a return to the Board of Trade of the debtor's assets transferred to him, within a certain time of his appointment as trustee, and to make further returns showing assets held by him periodically during his trusteeship.

Second, control over the accounts of a trustee should be strengthened by requiring him to transmit six-monthly accounts not only to the creditors but also to the Board. Consideration might also be given (i) to requiring the trustee to furnish his final account to the Board of Trade within two months of completing the winding-up, and (ii) to the requirement of an annual audit of the trustee's accounts by the Board; at present an official audit takes place only if a majority in number and value of creditors so demand.

The Council have six further recommendations to make on deeds of arrangement, going beyond the question raised by the Committee, but which may conveniently be dealt with at this point:-

(1) In practice it is not always a simple matter to prove the commission of an available act of bankruptcy by a debtor who has executed a deed of arrangement, because, where a creditor seeks to rely upon this act of bankruptcy, it is necessary for his solicitors to obtain from the Deeds of Arrangement Registry an office copy of the deed of arrangement executed by the debtor and of the affidavit of execution and to produce these documents to the Registrar on the presentation of the petition. There appears, however, to be no requirement that a deed of arrangement as such should be advertised in time for creditors to learn of their right to commence bankruptcy proceedings. It is recommended, therefore, that (i) a deed of arrangement should be advertised in the London Gazette within seven days of registration with the Board of Trade, and that (ii) production of a copy of the issue of the London Gazette containing the advertisement should be proof in bankruptcy proceedings that the debtor has executed a deed of arrangement.

(2) Section 146 of the Law of Property Act, 1925 (as to relief against forfeiture), has special provisions relating to bankruptcy which do not apply to deeds of arrangement; they should be extended to do so.

(3) Unless a deed of arrangement incorporates the provisions of the Bankruptcy Act, 1914, relating to proofs, contingent claims are not provable (*Re Casse* (1937) Ch. 405); the provisions of the Bankruptcy Act, 1914, relating to proofs of debts should be incorporated into the Deeds of Arrangement Act, 1914, so as to negative *Re Casse*.

(4) The trustee of a deed of arrangement should be required to have the same qualifications as a trustee in bankruptcy (see page 10, clause 18, paragraph (B)).

(5) The trustee of a deed of arrangement should have similar powers to a trustee in bankruptcy for securing the co-operation of a debtor and the assistance of the Court. At present a trustee is powerless to compel the debtor to co-operate after execution of a deed of arrangement in which all the creditors have joined. It is suggested, therefore, that, except as to after-acquired property and so far as there may be any conflict with the provisions of the Bankruptcy Acts, upon the application of the debtor, or on refusal by the debtor to co-operate, then upon the application of the trustee under the deed or of any creditor, the Court should have power either to make an order adjudicating the debtor a bankrupt or making applicable to the deed any of the provisions of the Bankruptcy Acts, as the Court may think fit, and for the purpose of the first alternative the Court should have power to direct to what date (being a date not more than three months prior to the date of the application to the Court) the bankruptcy should relate back.

(6) There is no provision in the Land Charges Act, 1925, or in the Rules made thereunder, which enables the registration of a deed of arrangement under that Act to be cancelled, otherwise than pursuant to an Order of the Court or a Judge thereof under Section 8 (3) of the Act. Section 19 (1) (b) gives authority to make Rules for the cancellation of the registration of a land charge without an Order of the Court and Rules have been made for that purpose, but "land charge" as defined by Section 20(7) does not include a deed of arrangement and there is no corresponding provision applicable to the latter. Although this is primarily a matter of conveyancing practice, it is nevertheless directly related to the subject-matter under review regarding deeds of arrangement, and the Council accordingly suggest that a statutory amendment should be effected so that where a debtor has paid his creditors in full, he should be able to procure the cancellation of the registration in the Land Charges Registry of a deed of arrangement registered against him, without being obliged to obtain an Order of the Court or of a Judge.

B. THE BANKRUPTCY ACTS, 1914 and 1926

Acts of Bankruptcy

1. The Council wish to recommend the provision of an additional act of bankruptcy with regard to the professional discipline of the solicitors branch of the legal profession. The existing procedure for dealing with solicitors who default is slow and cumbersome. Even if there is an obvious case of dishonesty where an order can be made at once to freeze the defaulter's accounts, as much as three months or more may then elapse before disciplinary procedure can be carried through to debar him from practice, and during this period defalcations may continue under guise of new accounts and assets may disappear. Ordinary bankruptcy proceedings against the defaulter may be almost as slow. But it is desirable, in the Council's view, that matters should be brought quickly to a head in such cases. This would serve to prevent further fraud, give prompt notice that the offender is likely to cease practice, and make an early start with marshalling his assets before they begin to disappear.

It is recommended, therefore, that the making of an order under paragraph 5 of the First Schedule to the Solicitors Act, 1941 (freezing the accounts), should operate as an act of bankruptcy upon which the Council of The Law Society, and the Council only, should be empowered to present a bankruptcy petition against the solicitor whose accounts were the subject of the order.

2. Frequently in criminal proceedings leading to conviction for an offence relating to money (e.g., larceny of money, embezzlement, fraudulent conversion, or obtaining money by false pretences), the offender's civil

liability for the debt is either proved or admitted. But the victim of the offence who has prosecuted the criminal to conviction has then, as creditor, to sue him civilly to judgment before any step can be taken to make him bankrupt. This means having to go through the solemn farce of suing the debtor, obtaining judgment, issuing a bankruptcy notice and presenting a petition. During the whole of this period, the debtor can dissipate his assets so as to put them out of reach of his creditors and the trustee in bankruptcy.

The Council recommend that the conviction of a debtor for a criminal offence relating to money, such as larceny, embezzlement, fraudulent conversion or obtaining by false pretences or on a forged or false document, should, in the event that restitution has not been made, be deemed to be a final judgment upon which bankruptcy proceedings could be taken; and that the production of the certificate of conviction should be evidence of the original indebtedness in the amount mentioned in the certificate of conviction. Moreover, when a person is convicted before any of the superior criminal courts, the finding that he has been convicted of such an offence involving a sum certain in money and that restitution has not been made, should be enforceable as a judgment of the High Court.

3. Paragraph (c) of Subsection (1) of Section 1 of the 1914 Act provides that, if execution against a debtor has been levied on his goods under process in an action in any Court, this shall in certain circumstances be an act of bankruptcy by the debtor. In order to prove that act of bankruptcy upon the hearing of a petition, the creditor must, however, provide an affidavit by the sheriff or his officers proving the seizure and sale of the goods and that the sheriff has remained in possession of them for twenty-one days.

It is suggested that proof of this act of bankruptcy should be made easier, so that unless the petition is disputed by the debtor on the ground that he has not committed an act of bankruptcy, the creditor could prove the necessary facts required by paragraph (c) by certificate under the hand of the sheriff as to the date of seizure and sale, or as to the date of seizure and of the sheriff remaining in possession for the statutory period of twenty-one days.

4. Paragraph (g) of Subsection (1) of Section 1 of the Act confers power to go behind a judgment which has been held to be exercisable by the Court only upon the hearing of the petition; upon an application to set aside a bankruptcy notice, the Court has no power to go behind the judgment and inquire into the consideration for the debt.

It is recommended that the power of the Court to go behind the judgment on the hearing of the petition should be further limited so long as the judgment remains, so that where the debtor invites the Court to examine the consideration for the judgment debt, the Court should in a proper case adjourn the hearing of the petition pending an application by the debtor to the Court in which judgment was obtained, to set aside that judgment. This would take place in the same way as the Court now takes such a step when anyone attacks the consideration on the hearing of the application to set aside the bankruptcy notice.

5. The cases in which a creditor can amend a bankruptcy notice are very strictly limited.

Consideration should be given to conferring additional power on the Court to amend a bankruptcy notice so as to prevent a debtor taking too many technical points upon it. This power should not of course be exercisable if any injustice would result to the debtor.

6. It is doubtful whether a fine ordered to be paid by a court of law is capable of being made the subject of a bankruptcy notice and a petitioning creditor's debt; the Council recommend that doubts should be removed by a provision confirming both these points in the positive sense.

The observation made in the foregoing paragraph applies equally to a demand for payment of the general rates made under the statutory powers applying outside the area of the Metropolitan Borough Councils. In order that there should be uniformity both inside and outside the London area regarding the enforcement of payment of rates, the Council recommend that when a demand for rates has been made the subject of a magistrate's order for payment, it should (similarly as in the foregoing paragraph) be capable of being made the subject of a bankruptcy notice and of constituting a petitioning creditor's debt.

Conditions on which a Creditor may petition

7. The Council have already suggested increases in the monetary limits prescribed by Section 4 of the 1914 Act, in reply to the third question asked by the Committee (see page 3).

8. At present neither divorce damages nor divorce costs constitute a good petitioning creditor's debt (see *ex parte Muirhead*, 2 Ch. D. 22), the main reason being because the damages are ordered to be paid into Court, and the costs to the petitioner's solicitor. To get round the difficulties in such a case, the orders for damages and costs must be amended so as to require payment to the petitioner direct; this is quite straightforward as regards divorce costs, but as regards divorce damages means that the Court loses control over the damages. In the opinion of the Council it is wrong that a co-respondent in a divorce case who has been ordered to pay damages in the Divorce Court should be allowed to go scot-free with respect to those damages. It is accordingly suggested that such damages should be made capable of constituting a petitioning creditor's debt, possibly with leave of the Divorce Court and with the undertaking of the petitioning creditor to pay into Court the amount of damages so awarded in the event that the petitioning creditor should receive them. Consideration might also be given to the enactment of a similar rule applicable to arrears of maintenance ordered to be paid by a Divorce Court.

Proceedings on a Creditor's Petition

9. Subsection (2) of Section 5 provides that upon the hearing of a petition the Court shall require proof of the debt of the petitioning creditor. This proof should not be required when the act of bankruptcy relied on by the creditor is non-compliance with the requirements of a bankruptcy notice served on the debtor at the instance of the petitioning creditor; in these cases an affidavit by the petitioning creditor verifying the petition should suffice.

It is always open to a debtor who has a judgment against him to apply for an order of set-off, or an order directing that satisfaction be entered with respect to his judgment under Order LXV, Rule 13, of the Rules of the Supreme Court; see the case of *Puddephat v. Leith* (No. 2) [1916] 2 Ch. 168, also *Re a Debtor* (No. 21 of 1950) (No. 2) [1951] Ch. 612. It is suggested, therefore, that Section 5 should be amended to the effect that, if an act of bankruptcy relied upon by the creditor is the non-compliance by the debtor with the requirements of a bankruptcy notice, the onus should be upon the debtor to show that he is not indebted to the creditor, and otherwise the indebtedness should be presumed.

10. The Court fee on the presentation of a bankruptcy petition is at present £6, which covers the presentation of the petition and the sitting of the Court on the hearing of the debtor's public examination. Where the petition is dismissed so that there is no public examination, the Council suggest that half of the Court fee should be returnable, because there appears to be little justification for a Court fee as high as £6 in such a case.

Power to appoint Interim Receiver

11. At present the Court can only appoint the Official Receiver as interim receiver, and this power appears to the Council to be unduly

restrictive. They submit that Section 8 should be amended so as to give the Court power to appoint some other person as interim receiver, provided that other person is appointed with the approval of the Official Receiver. The person appointed as interim receiver, if other than the Official Receiver, should of course be required to give security.

Power to appoint Special Manager

12. Section 10 gives the Official Receiver power upon the application of a creditor to appoint a Special Manager of the estate or business of the debtor. The power of the Official Receiver under this Section should be extended, so that it is exercisable by him on his own motion without the previous application of a creditor.

Power to rescind Receiving Order

13. Section 12 gives the Court power to rescind a Receiving Order in certain cases where it becomes apparent that proceedings should more properly be carried on under the law relating to bankruptcy in Scotland or Ireland, but this section appears to the Council to be of little or no value. They therefore recommend the repeal of Section 12.

Debtor's Statement of Affairs

14. Section 14, Subsection 2 gives the Court power to extend the debtor's time for filing his statement of affairs. From a practical point of view, it appears desirable that there should be an alternative power in the Official Receiver to extend the time for filing the statement of affairs. Moreover, if there are insufficient assets in the estate to pay in full for the preparation of the statement of affairs, then it should be prepared for the debtor by the Official Receiver or a person appointed by him at the expense of the estate (if any), so that the debtor will have no excuse for failing to file his statement of affairs as required by the Official Receiver. This will also make it possible to produce a more accurate Deficiency Account, which most debtors find difficult to do by themselves. It is further suggested that failure by the debtor to file a statement of affairs should be made a criminal offence, or alternatively should be punishable by the Court as a contempt.

Public Examination of Debtor

15. Under Section 15, Subsection 4 any creditor who has merely tendered a proof is empowered to question the debtor at the public examination. Subsection 4 might however be altered with advantage so as to require that only a creditor whose proof has been tendered, and admitted by the Official Receiver or the trustee for the purpose of voting, should be empowered either in person or by his representative authorised in writing, to question the debtor.

Section 15, Subsection 5 provides that the Official Receiver if specially authorised by the Board of Trade may employ a solicitor to take part in the examination of the debtor upon his public examination. The word "specially" should be deleted.

Subsection 6 of Section 15 provides that, if a trustee is appointed before the conclusion of the public examination, he may take part in it; it is suggested that unnecessary private examinations of the debtor could be avoided by a provision that the public examination should not be concluded until after a trustee (if appointed) should have had an adequate opportunity of preparing himself for and of carrying out an examination of the debtor at the public examination.

It is also suggested that Section 15 should be amended so as to confer power on the Court at any time before the debtor's discharge becomes effective, on the application of either the Official Receiver or of the trustee, to restore the public examination of the debtor. This would have the effect of making it unnecessary for the trustee or Official Receiver to continue additional private examinations of the debtor at further cost to the estate.

Composition or Scheme of Arrangement

16. Section 16 (dealing with compositions and schemes of arrangement) should, the Council suggest, be altered in accordance with the following recommendations:-

- (A) Subsection 5 should be amended so that the Official Receiver must apply to the Court for a direction as to whether approval shall or shall not be given to the composition or scheme.
- (B) Subsection 6 should be amended so that, if the composition or scheme is approved by the Court, there should be a discretion in the Court as to whether the public examination of the debtor should be dispensed with, unless it is felt by the creditors that in the event of the approval of the scheme there should be no need for any public examination. The requirement of the public examination hardly encourages the debtor to bring in a scheme, and on the other hand there seems to be little purpose in holding the public examination if the scheme has been approved.
- (C) Subsection (13) should be amended so that the composition or scheme should only be binding upon those creditors who have proved in the bankruptcy, or as the debtor may disclose in his statement of affairs.
- (D) Section 16 contains no express provision as to what are to be the powers of the debtor over his property after the approval of a composition; his rights should be clarified, and in this connection the Council invite attention to the observations on page 101 of Williams on Bankruptcy (16th Edition).

Adjudication of Bankruptcy

17. In the opinion of the Council, the application to the Court for adjudication of bankruptcy under Section 18 is unnecessary. They suggest that the section should be amended so that if a Receiving Order is made against a debtor, and not rescinded within a limited period of time, and if no proposal is made for a scheme or composition within that period, then adjudication of the debtor should be automatic without any application to the Court.

Appointment of Trustee

18. Section 19 should, it is suggested, be amended in the following respects:-

- (A) The creditors should be able to appoint the Official Receiver as trustee in a non-summary case. (This proposal has already been made in reply to the Committee's question 5 on page 3.)
- (B) As the law stands at present, a person without any professional qualifications at all can be appointed a trustee; and it happens from time to time that trustees are appointed from this category, particularly from those calling themselves accountants but whose certificates are not acceptable to the Revenue for tax purposes. The Council recommend that the trustee (except where the Official Receiver so acts) should be a person holding some recognised professional qualification.
- (C) It appears to be anomalous that there should be one rule applicable to the appointment of a liquidator for winding up an insolvent company, and another for the appointment of a trustee in bankruptcy. In order that the rule for the election of a person as trustee should be the same as that for a liquidator, the Council recommend that a person to be appointed as trustee should be elected by a majority in number and value of the creditors voting.

(D) Subsection (6), line 8, should be amended by substituting "may" for "shall" with respect to the power of the Board of Trade to appoint some person other than the Official Receiver to be trustee of the bankrupt's property. This would enable the Official Receiver to continue to act in the bankruptcy, except perhaps in a case where there may be so many bankruptcies with the particular Official Receiver that the Board of Trade must relieve him by appointing another person to be trustee.

Power to accept Composition after Bankruptcy

19. Section 16 deals with compositions before adjudication, and Section 21 with those made afterwards. It is recommended that these sections should, so far as possible, be made alike by bringing the basic provisions of Section 21 *mutatis mutandis* into line with those of Section 16.

Control over Person and Property of Debtor

20. In view of their recommendation supporting the Committee's scheme for automatic discharge (see page 2), the Council wish to suggest that Sections 22 and 23 dealing with control over the person and property of a debtor should be strengthened. The Court should upon adjudication be able to order a debtor to give up his passport, and to prevent his obtaining a new one without an order of the Court. These powers of the Court should be exercised on the same lines as the Court now gives or withholds permission for a bankrupt to become a director of a company, notwithstanding the fact that the bankrupt may be undischarged; the powers should, however, be exercisable in Chambers and not in open Court.

The powers of the Court under Section 23, Subsection (1), paragraphs (a), (b) and (c) are at present rarely exercised, and it is felt that greater use might be made of these powers. There should also be additional power in the Court to direct a warrant to be issued for the apprehension of the debtor if he should fail to attend on the Official Receiver. Although in such a case the fraudulent removal of the assets by the debtor is a criminal offence under the Act, this offers inadequate protection; it is rather like shutting the stable door after the horse has bolted.

Enquiry as to Debtor's Conduct, Dealings, and Property

21. The following points arise on Section 25 (which relates to the private examination of the debtor and other witnesses):-

(A) Subsections (4) and (5) empower the Court on the examination of a witness in the event of the witness admitting indebtedness to the debtor or that he holds property of the debtor, to order the witness to pay to the trustee the amount admitted, or to deliver up to the trustee the property the witness admits to be in his possession. But if the witness does not formally admit the debt or the possession of the debtor's property, the Court cannot make an order for payment or delivery up under Subsections (4) and (5). It often happens that a witness knows of this restriction on the Court's powers, and therefore refuses to admit his indebtedness or possession of the property, and in consequence the Court's hands are fettered. On the other hand, the facts admitted by the witness are often such that it is clear that he has no answer to a claim by the trustee for payment of the money or for delivery up of the property; but nevertheless the trustee's sole remedy is to bring an action against the witness to recover the money or the property as the case may be. It is recommended that in clear cases of this type the Court should have power to order payment or delivery up, and also to direct the costs of the examination to be paid by the witness.

(B) Before an order is made under Section 25 for the examination of a witness, the Court as a matter of practice insists that the report of the trustee or Official Receiver should contain a clear statement

that the witness has previously been asked by letter, written either by the trustee, Official Receiver, or the solicitor acting, to give the information for which the witness is about to be asked on the occasion of his examination, and that notwithstanding that request the witness has refused to give that information. Unless it is clear from the report that such is the case, the Court will rarely make an order for the examination of the witness. In these circumstances, therefore, if a witness has been put to trouble and inconvenience in attending for examination, he has brought the difficulties on himself; and the Council feel it is wrong that because of the recalcitrant attitude of the witness, the estate should be made to bear the costs of an examination which might otherwise have been avoided. They accordingly recommend that the Court should be given power, exercisable at the discretion of the Registrar, in a proper case to order a witness summoned before it under Section 25 to pay the costs of the examination.

(C) In the case of *Ex parte Reynolds*, 21 Ch. D. 601, it was decided that a witness ordered to attend for examination under Section 25 could not be ordered to furnish an account in writing not on oath. It is suggested that this decision should be reversed by a statutory amendment.

(D) Finally in regard to Section 25 it is suggested that the powers of the Court should be strengthened to deal with the event of the non-attendance of a witness for examination when properly summoned and provided with conduct money, so that on proof of due service upon the witness and of payment of conduct money, the Court should be enabled immediately to issue a warrant for his apprehension.

Rules as to Proof of Debts

22. Section 32 and Schedule 2, paragraph 25, give a right of appeal to a creditor against the trustee's decision in respect of the proof of a debt, but the debtor himself has no right of appeal in bankruptcy if he is aggrieved by the decision of the trustee. The debtor is very much interested in a creditor's proof of debt as to the amount at which that debt may be admitted to rank for dividend, and this may determine whether the debtor has committed a bankruptcy offence. It is submitted that the debtor should have the same right of appeal as to proof as the creditor, provided he gives security for the costs of the creditor and the trustee.

Where a person has obtained judgment under the Legal Aid and Advice Act, 1949, as an assisted person against a debtor and proves against his estate in bankruptcy, the trustee is placed in a difficulty, for under the provisions of Regulation 16 (1) of the Legal Aid (General) Regulations, 1950, any dividend payable to the assisted person as judgment creditor must be paid to the assisted person's solicitor who alone can give a good discharge for the moneys so payable. This conflicts, however, with the law of bankruptcy, which makes the dividend payable to the judgment creditor. It is submitted that appropriate provisions should be introduced into any amending legislation on the law of bankruptcy to enable a trustee to pay dividends to the assisted person's solicitor in accordance with the Legal Aid Regulations and to obtain from him an effective receipt and discharge.

Where a creditor's proof is rejected and the appointment of a trustee in bankruptcy is in issue, then if the rejection of proof is made known at the first meeting of creditors the Council suggest that the Official Receiver should be required to adjourn the meeting and postpone the appointment of a trustee until the question of proof has been settled.

Postponement of Husband's and Wife's Claims

23. The Council submit that it would be convenient to add to the provisions of Section 36, which deals with the postponement of spouses' claims as creditors in bankruptcy, the provisions in Sections 2 and 3 of the Partnership Act, 1890.

24. Section 38 (dealing with assets divisible amongst the creditors) should, the Council submit, be altered as follows:-

- (A) It should be made clear by express enactment that money standing to the credit of a solicitor's client account, by whatever name it may be called, shall be deemed *prima facie* to be property held by the solicitor, if a bankrupt, on trust for another person.
- (B) The limit in respect of bedding and tools of the bankrupt should be increased to £75.
- (C) It appears to be highly undesirable that a person adjudicated bankrupt or against whom a Receiving Order is made should be able to continue to act as a personal representative or as a trustee. For example, if a bankrupt is appointed sole executor of his father's will, and he proves the estate, then even if he is virtually absolutely entitled, so long as he is acting as personal representative or trustee and not as beneficial owner, the trustee in bankruptcy is unable to compel him to transfer the estate. Thus the bankrupt can continue to deal with the assets - although they may constitute after-acquired property - for a considerable period of time, to the detriment of the trustee in bankruptcy and of the creditors. Accordingly, it is recommended that express provision should be made to prohibit a person adjudicated bankrupt, or against whom a Receiving Order is made, from continuing to act as a personal representative or trustee, and for the appointment of someone else in his stead. The Court in Bankruptcy should have the same powers with respect to the appointment of new trustees as the Court of Protection has when a lunatic is declared to be incapable of acting as trustee. Once a Receiving Order has been made, either the Official Receiver, the trustee in bankruptcy, any co-trustee of the debtor or any beneficiary under the trust should be at liberty to apply to the Bankruptcy Court in a summary manner for the appointment of some other suitable person or persons or a trust corporation to be a trustee or trustees in place of the debtor and to act where necessary jointly with any other trustees. The Court should be given express statutory power on the hearing of the application and on the making of any new appointment to direct that the person or persons appointed to be the new trustee or trustees should have power to charge, in the case of an individual in the terms of the usual full solicitor's charging clause, and in the case of a trust corporation on a scale to be prescribed by the Lord Chancellor on the lines of the Public Trustee's scale or at such higher rate as the Court may approve in the special circumstances of any particular case. It is also pointed out that some provision would be required for the protection of third parties dealing with a debtor without knowledge of the above disability.
- (D) *Re Walter* (1929) 1 Ch. 647 decided that debts for necessities should be paid out of accumulations of personal earnings of a deceased bankrupt, in priority to the debts in the bankruptcy. It is uncertain whether this decision would apply to similar accumulations of earnings of a bankrupt who was still alive. Provision should, it is submitted, be made for payment of debts for necessities incurred after the bankruptcy out of any after-acquired assets, whether they are accumulations of personal earnings or otherwise.
- (E) There is some doubt as to the necessity for the trustee in bankruptcy to give notice of his claim in respect of equitable choses in action, reversionary interests and policies of assurance, so as to obtain priority over the claim of a subsequent incumbrancer without notice of the bankruptcy. In the case of equitable choses in action and policies of assurance, the rights of the parties appear to be governed by the order of priority of notices. It is suggested that this rule should be expressly confirmed, and the rule as to priority regarding reversionary interests should be clarified similarly for

the protection of subsequent encumbrancers without notice, by application of the principle applicable to the first two kinds of property.

(F) No definition is given in the Act of the phrase "trade or business" which appears in Section 38 and elsewhere in the Act; it seems desirable that the definition given in the Partnership Act, 1890, should apply.

Duties of Sheriff as to Goods taken in Execution

25. Consideration should be given to amending Subsection 2 of Section 41. At present this Subsection applies where execution is completed in respect of a judgment for a sum exceeding £20. In practice a judgment may exceed £20, but be paid in instalments until less than £20 is owing, while the money accruing from the execution still has to be held for the period of fourteen days. It is suggested, therefore, that to rationalise the principle on which the Subsection operates, there should be an amendment to the effect that the Sheriff, where a writ of execution is endorsed to levy more than £50 under any judgment, should be required to hold the proceeds of sale or money paid for a period of twenty-one days after execution is completed. This recommendation is thought to be required in addition to the powers of the Court under Section 115 of the Companies Act, 1947.

Avoidance of Settlements

26. Section 42, Subsection 1 provides, inter alia, that certain settlements shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy. Having regard to the increased complexity of the financial arrangements being made in recent years and the consequent difficulty the trustee is likely to experience in taking steps to avoid these settlements before the property is lost to the creditors, it is recommended that the period of two years in Subsection 1 be increased to three years.

Fraudulent Preferences

27. Under Section 44 dealing with fraudulent preferences:-

(A) There is no avoidance of transfers or payments made between the date of the presentation of the petition and the date of the Receiving Order, and in such cases the trustee has no remedy unless he can show that the creditor had notice of an act of bankruptcy or of the presentation of the petition. It is submitted that this result is an obvious oversight in drawing the section and should be remedied.

(B) It might also be made clear in any new Bankruptcy Act that Section 44 of the 1914 Act is supplemented by Section 92 of the Companies Act, 1947.

Protection of Bona Fide Transactions

28. Section 45 provides for the protection of payments by the debtor of lawful debts and of dealings for value generally, but does not protect a solicitor who is acting for a debtor in prosecuting or defending an action, in the event of the solicitor receiving notice of the commission by a debtor of an act of bankruptcy. Such proceedings may well result in a benefit to the assets of the debtor and also the costs are subject to taxation. Provision should, it is submitted, be made to protect the solicitor in the same way as he is protected with respect to his costs for defending a debtor on a criminal charge or on a disputed bankruptcy petition.

Dealings with Undischarged Bankrupt as regards After-Acquired Property

29. Section 47 affords protection in certain circumstances to a person who buys after-acquired property from a bankrupt. The Council suggest that the section should be amended in the following respects:-

(A) The section applies only to dealings for value, and does not apparently cover the case of the payment of a legacy to an undischarged bankrupt, without notice of the bankruptcy; in such cases the personal representatives making the payment should be protected, provided they have no notice of the bankruptcy.

(B) The section does not state what is necessary to constitute "intervention" by the trustee; this should be defined. The trustee frequently enquires about after-acquired assets, but it is difficult at present to say when he has intervened.

(C) Subsection (2) relates to dealings of bankers with persons who are undischarged bankrupts and provides in general that, if a banker ascertains that a person having an account with the bank is an undischarged bankrupt, the banker shall inform either the trustee or the Board of Trade. This provision should be strengthened by requiring the banker to inform both the trustee and the Board of Trade of after-acquired property, without any right of election as to which party he informs.

Possession of Property by Trustee

30. Section 48 deals with possession of property by the trustee in bankruptcy, and Subsection 3 of that Section gives the trustee the same right to transfer stocks and shares as the bankrupt formerly had himself. It often happens, however, that a person who is the owner of shares in a private limited company becomes bankrupt. But there is invariably a restriction in the articles of association of the company, which limits the transfer of shares and which may also prevent the trustee from becoming registered as owner of shares held by the bankrupt. In such a case the trustee cannot deal with the beneficial interest in them. The directors of the company are not infrequently friends or relatives of the bankrupt, who may use the right to restrict transfer for the purpose of helping the bankrupt, rather than the bankrupt's creditors.

The weakness of the trustee's position was shown by a recent decision of the Chancery Court in the case of *Re Bolton (N.L.) Engineering Co., Ltd.* [1956] W.L.R. 844, where it was held that the trustee in bankruptcy of a shareholder in a limited company, who had not obtained registration of the bankrupt's shares in his own name, had no locus standi as a contributor to present a petition for the compulsory winding-up of the company.

It is recommended, therefore, that, subject to any provision in the articles of a company requiring the shares of a bankrupt member to be offered first for sale to the other members of that company, provision should be made entitling the trustee to be registered as a member of a company in which the bankrupt holds shares as a member and conferring on the trustee when so registered the same rights as the bankrupt had as a member immediately before the commencement of his bankruptcy. An additional provision would be necessary to ensure that if the company is an exempt private company its status as such could not be prejudiced by the registration of the trustee, and to preserve any lien in such shares which the Company might have under its articles.

Vesting and Transfer of Property

31. Section 53 (transfer of property) should, the Council consider, be amended to provide that where a trustee in bankruptcy deduces title to land forming part of an estate in bankruptcy, it should be sufficient proof of title for the trustee to produce the order of adjudication and office copy certificate of his appointment as trustee (if any), without obtaining an office copy of the receiving order, and that no further evidence of his rights as trustee should be called for upon the deduction of title.

Powers Exercisable by the Trustee

32. Section 56 contains a statement of certain powers exercisable by the trustee with the permission of the Committee of Inspection. In the opinion of the Council, the general powers of a trustee should be made exercisable by the trustee with the permission of the Committee of Inspection, or alternatively with the permission of the Board of Trade, subject to a reserve power in the Board of Trade to give permission so to act to an Official Receiver in a proper case. With regard to paragraph (3) of Section 56, the power of a trustee to employ a solicitor with this permission should be enlarged in conjunction with the recommendation made below on Section 83 and Rule 106 (see clause 34 on this page).

Official Receivers

33. Section 70 (appointment of Official Receivers) contains no requirement as to the qualifications of persons to be appointed Official Receivers. Originally the majority of Official Receivers throughout the country were solicitors and until recent years the majority of Official Receivers in the High Court were solicitors. In the High Court at present no Official Receiver is a solicitor. It is recommended that the qualifications of an Official Receiver should be prescribed by statute and if (as the Council recommend), the professional qualification is to be that of a solicitor or accountant of a certain number of years' standing, a balance should be required to be preserved by means of alternative appointment of solicitors and accountants.

Allowance and Taxation of Costs

34. Section 83, Subsection 3, provides for the taxation of all solicitors' costs by the taxing master in bankruptcy, and requires a sanction for the employment of a solicitor to be obtained by the trustee before the employment takes place, except in cases of urgency. In practice, however, if a solicitor receives instructions from a trustee and then enquires about the existence of a retainer and asks for a certified copy of the sanction, generally there will be a risk of friction with the trustee. Even in cases of urgency there is often difficulty in satisfying the Court on taxation that the circumstances required urgent steps to be taken, particularly as taxation usually takes place long after the event when the reason for urgency is no longer so clearly apparent. The Council accordingly submit that the last sentence of Subsection 3 should be repealed as being unduly oppressive.

After careful consideration of the point, it seems to the Council that there is no sufficient reason for a retainer being obtained before the bankruptcy work is commenced, provided that the solicitor is retained at some time or another. This system operates very well in the Companies Court where the solicitor may be retained at any time even after the work has been completed so that he may then proceed to a taxation of his costs. The Council believe that the position in bankruptcy should be similar to what it is in the Companies Court, and they therefore recommend that Section 83 should be amended to this effect.

In connection with Section 83, it is necessary to draw attention to the difficulties imposed by Rule 106 of the 1952 Rules which makes it compulsory for the Committee of Inspection to fix a limit to a solicitor's costs for particular proceedings or business which it may sanction, and provides for increase of the limit upon application by the trustee before or within three months after the limit has been reached. As pointed out at page 235 in the Supplement to Williams on Bankruptcy (16th Edition), it is doubtful whether Rule 106 is *intra vires*, and the Council would prefer its repeal, but if the Rule is to be retained in any form, it is submitted that -

- (A) There should be no limit of time of three months in which to obtain an increase of the limit of costs, because this is unnecessary for the reason that the estate is protected by taxation of costs.

(B) The solicitor himself should also be able to apply for extension of the limit of costs.

(C) Paragraph (2), which provides that no costs of an application to the Court under the proviso to paragraph (1) of the Rule shall be chargeable against the estate, should be altered so that the costs of the application shall be dealt with in the discretion of the Court. The reason for this proposal is that difficulty often arises where a trustee does not comply with the Act or the Rules, and as the solicitor is to a great extent in the hands of the trustee it is only proper that provision should be made to protect the solicitor.

(D) Taxation of matters in bankruptcy under the 1914 Act is regulated by the practice of the old Court of Bankruptcy and not by the Solicitors Acts; it is suggested that consideration should be given to assimilating the two systems and to bringing the scale of bankruptcy costs up to date.

Investment of Surplus Funds

35. Section 90 provides for the investment of surplus funds under the control of the trustee. In view of the frequency of "rights" issues today, the Council suggest that it would be of benefit to a bankrupt's estate and to the creditors generally, to give a statutory power to the trustee to take up "rights" attached to shares, with the consent of the Committee of Inspection or of the Board of Trade, and to use the funds of the bankrupt's estate for this purpose.

Removal of Trustee

36. Section 95, Subsection 2 empowers the Board of Trade to remove a trustee, and it is recommended that this power should be extended so as to be exercisable if the Board has reasonable cause to suspect the trustee of misconduct. This proposal is in line with that made in respect of a trustee of a deed of arrangement on page 4, and is made for the same reasons.

Court in which the Petition is to be Presented

37. Section 98, Subsection 1 (prescribing the appropriate Court for bankruptcy proceedings) is anomalous to the extent that it is not known what efforts must be made by a petitioning creditor to find out the residence of a debtor, before the creditor is able to say he is "unable to ascertain" it. It is submitted that the words "does not know" should be substituted for the words "is unable to ascertain."

As it now stands, the Subsection permits the creditor to present a petition in the High Court if he knows a business address of the debtor within the district of a County Court but does not know the debtor's residence; it is suggested that the local County Court is the proper Court in such a case, and that this should be recognised by an appropriate amendment of the Subsection.

It is further suggested that petitions by the Inland Revenue should be required to be presented in the Court which has jurisdiction over the debtor and not in the High Court. In this connection, it is pointed out that when the Receiving Order is obtained in the High Court it is usually transferred to the County Court having jurisdiction.

Transfer of Proceedings from Court to Court

38. Section 100 should, it is submitted, be amended as follows:-

(A) A motion involving a sum, for example, greater than £500 should be enabled to be heard in the High Court without the necessity of removing proceedings from the County Court.

(B) At present different Rules apply for removal of proceedings from the High Court as compared with removals from one County Court to another (see Williams on Bankruptcy (16th Edition) page 461, and the Supplement thereto at page 235); there should be easier transfer to and from the High Court and from one County Court to another.

Jurisdiction of Registrar in Bankruptcy

39. The Council suggest that in Section 102:-

(A) Subsection 3 should be amended so as to give a Registrar of a County Court powers of granting discharges similar to those of a Registrar in the High Court, but the bankrupt should have the right to be heard by the County Court judge instead of the Registrar, if he so desires. The bankrupt should have an absolute right of appeal to the Court of Appeal or Divisional Court for an order made on application for discharge.

(B) Subsections 4 and 5 should be repealed.

Appeals in Bankruptcy

40. The Council have three recommendations to make upon Section 108 (which deals with appeals from County Courts and from the High Court):-

(A) At present appeals from the County Courts go to a Divisional Court of the Chancery Division and those from the High Court go direct to the Court of Appeal. This difference appears to be an anachronism which arose out of the old procedure; it should be eliminated so that an appeal from the County Court would lie direct to the Court of Appeal.

(B) It seems to be anomalous that there can be no appeal to the House of Lords when the bankruptcy is pending in a County Court, despite the fact that in bankruptcy the County Court has equal jurisdiction with the High Court, and there is no limit as to amount. This distinction should be eliminated, and there should be the usual right of appeal to the House of Lords either with leave of the Court of Appeal or with special leave.

(C) In an appeal from the County Court the grounds of appeal must be stated, whereas in an appeal from High Court this is not necessary. It is suggested that there is no justification for this difference, and that no statement of the grounds of appeal should be required in either case.

Administration of Estate of Person Dying Insolvent

41. The Council propose the following amendments to Section 130:-

(A) As regards Subsection 3, it is pointed out that the cost of dealing with an estate of a deceased debtor in an administration action in the High Court is so considerably in excess of dealing with one under Section 130, that no useful purpose can be served by retaining the matter as an ordinary administration action in the Chancery Division. The latter course offers no advantage to creditors, but is much more expensive, as the costs in an administration action are all out of proportion to what is involved. Subsection 3 should be amended so as to make it imperative for the Chancery Division to transfer proceedings to the Bankruptcy Court whenever in an administration action the estate of a deceased debtor should be insolvent.

(B) Subsection 3 restricts the right to present a bankruptcy petition relating to the estate of a deceased debtor. The restriction should be varied so that the bar to presentation of petitions would come into effect not upon the commencement of an administration

action, but only after the making of an administration order in the High Court. In this connection, it is material to point out that a creditor has no certain means of knowing that an administration action has been commenced.

Recovery of Property Transferred without knowledge of Receiving Order

42. It was suggested recently by the Court (in an unreported case) that under Section 4 of the Bankruptcy (Amendment) Act, 1926, where a bank had paid money out of a debtor's account after the making of a Receiving Order but before notice had been gazetted, and had refunded the money to the trustee, the latter had in consequence no cause of action against the person to whom the money had been paid, and the bank would accordingly be the loser. It is submitted that in such a case the bank should be deemed to be subrogated to the trustee and as such to be entitled to recover from the party to whom the money had been paid.

June, 1956.

LETTER RECEIVED FROM
THE LAW SOCIETY

Law Society's Hall,
Chancery Lane,
London, W.C.2.

18th February, 1957.

B. Macfavis, Esq.,
Joint Secretary to the Committee
on Bankruptcy Law Amendment.

Dear Mr. Macfavis,

I have pleasure in enclosing the draft transcript of our oral evidence which has been fully amended by the representatives of the Council who gave evidence before your Committee.

During the process of polishing up the transcript, two further points occurred to us to which we believe we should draw your attention.

The first point is concerned with the recommendation in paragraph 2 on page 6 of the Council's Memorandum of Evidence which advocated that it should be possible to issue a bankruptcy notice upon a certificate of conviction in respect of a crime involving money. In a trial upon indictment, it is wholly immaterial for the purpose of the direction to the jury whether the man has stolen or embezzled £100 or £77.10s., as all the jury has to find is whether the prisoner is guilty of stealing a sum of money, the amount of the sum stolen or embezzled being quite immaterial. The result therefore, is that for a criminal trial, a person may have been actually indicted with stealing a sum of £100, but has in fact stolen only £77.10s., and upon conviction for the offence charged on indictment, the certificate of conviction will read that he has been found guilty of stealing or embezzling the sum named in the indictment (i.e. £100). The result would of course conflict with our recommendation that the amount mentioned in the certificate of conviction should be evidence of original indebtedness. I am asked to point out, therefore, that if our recommendation on this subject is adopted, it will be necessary to make provision so that the certificate of conviction on indictment will certify the exact amount which the prisoner may have stolen or embezzled.

The second point is a proposal for an addition to Section 83 of the Bankruptcy Act, 1914. In view of the definition of "contentious business" in Section 13(4) of the Solicitors (Amendment) Act, 1956, to include

business done in or for the purposes of proceedings before a Court, it is contended that the absurd result follows that, if a trustee in bankruptcy instructs a solicitor to carry out a sale or property or to do other conveyancing work, such work would be contentious business within the meaning of the section, and item charges would apply instead of the usual scale fee. There is no reason why there should be a dichotomy as between conveyancing costs inside and outside bankruptcy, as the nature of the work does not change, and this alleged result of Section 13(4) appears to be unintentional. To clarify the position and to remove doubts, the following sub-section should, it is suggested, be added to Section 83 of the Act of 1914, when this is consolidated:-

"For the removal of doubt it is hereby enacted that work or business done by a solicitor employed by a Trustee or Official Receiver in Bankruptcy shall not be deemed to be "contentious business" within the meaning of Section 13(4) of the Solicitors (Amendment) Act, 1956, by reason only of the fact that such work or business is done on the instructions of a Trustee or Official Receiver appointed under the provisions of this Act."

Yours sincerely,

(Sgd.) G. R. PROUDLOVE

Assistant Secretary.

EXAMINATION OF WITNESSES

Mr. Desmond Heap, LL.M., L.M.T.P.I.	}	Representing the Law Society
Mr. Gilbert Arnold King		
Mr. Sidney Pearlman		
Mr. Geoffrey Bender Proudlove, M.A.		

Called and examined

2249. Chairman: I am speaking for all my colleagues when I say thank you very much indeed for this most helpful memorandum which you have sent us. I see it is dated June this year. I do not think you have seen, have you, a revised scheme for dealing with the discharge problem called BLA/112? - (Mr. Heap): No, we had not seen it when our evidence was prepared.

2250. You have seen it since? - We have.

2251. Does it go some way to meet your point of view? - Yes. May I give some comments on that first? I want to emphasise that, in preparing this memorandum, the Law Society had the advantage of help from members who are not members of the Council, and particularly from the two gentlemen I have the good luck to have with me this afternoon, Mr. Pearlman and Mr. King who are very much experienced in these matters - much more experienced than I am. I would like, if I may, first to give some observations on behalf of the Law Society on the revised memorandum relating to the problem of discharge, and then on any points as to which you may require further particulars I must hand over to the two gentlemen who are much more expert in these things. As to the memorandum, we did consider this at a special meeting at the Law Society. We had received it from you after our evidence had been prepared and put in. I would like to say this about it. Taking the items A 1 (a), (b), (c) and (d), we like those restrictions. We think it is wise to have those limiting factors put in.

2252. I should add there we are proposing to add a clause to the effect that the scheme would not apply to bankrupts who have been convicted of any offence in connection with their bankruptcy. - I think we would like to have that too. Then in A 2 we should like to have any proving creditor to be able to put in for a caveat. You have limited it to the Official Receiver or trustee. Originally you did have the Official Receiver or any creditor, but now you have dropped the creditor and put in the trustee. We would like to have any proving creditor in as well.

2253. You realise this is all in the case of existing bankrupts? - That is so. We would like the Official Receiver or trustee or any creditor. Then when we come to A 3, we do desire a distinction drawn between pre-war bankruptcies, that is pre-September 1st 1939, and any bankruptcy since September 1st 1939. I am still dealing, of course, with existing bankruptcies at the time of the new Act. We would still say that for the pre-war bankruptcies we accept an automatic discharge in two years unless there be a caveat, but for post-September 1st 1939 bankruptcies we would say an automatic discharge after five years unless there be a caveat. We still ask for that. Then, as to future bankruptcies, may I take it that the limitations of A 1 (a), (b), (c) and (d), will in effect be applied?

2254. Not necessarily. - May I take it that a person who has not surrendered will not qualify for an automatic discharge?

2255. Not unless he were caveated. The Official Receiver, trustee and the creditors would have to consider applying for a caveat. - I am not quite sure I have got you right, but do I understand that those restricting qualifications A 1 (a), (b), (c) and (d) are not applied to future bankruptcies?

2256. No, not to future bankruptcies. - We rather thought they should be. We asked that they should be.

2257. It is rather difficult to see how they could be, is it not? If a discharge has already been pronounced that would not apply because the order is there. We did not envisage the case of the man who had previously been bankrupt, for example, being automatically caveated. - But you did envisage him, did you not, being automatically discharged unless he was caveated?

2258. No, in the case of existing bankruptcies he doesn't become discharged until he has applied. - Would the scheme for the future bankruptcies apply to a bankrupt who has not surrendered?

2259. No, it could not because his public examination would not have been concluded. - The benefits of this automatic discharge would not be open to the man previously bankrupt?

2260. Yes, they would be. - In our view they should not.

2261. You are going to keep the floating bankrupt figure very high, are you not? - We regarded it as a serious matter; the automatic discharge should not be given too lightly. We thought it over-generous in the way this was drawn. I was asking if limitations do apply to them. I think they substantially do from what you tell me.

2262. We can say this; obviously the bankrupt who has not surrendered could not get benefit from the new scheme because his public examination would not be concluded. - Your letter goes on to say, is it right for future bankruptcies that there should be an automatic discharge in the case of a second bankruptcy? We say to that, no. Then, under B 1 again, we would like to see the proving creditor as well as the Official Receiver or the trustee, just as I said before; and under B 2 again there should be a period of five years automatic discharge unless there be a caveat.

2263. I note what you say in your memorandum about that. A bankrupt can always apply within five years. For that matter, so can the Official Receiver or trustee apply for a caveat within two years and, if we accept your memorandum, a creditor. I take it you say the answer to that is that it is up to the bankrupt to make the application? - We felt the scheme a little too generous in allowing automatic discharge, and that in such cases it should be left to the bankrupt to apply.

2264. A surprisingly high proportion of people who do apply for their discharges at the moment are granted their discharge within a year from the conclusion of public examination, and a very high proportion are granted their discharges within two years of the commencement of the bankruptcy. During 1954 out of 271 discharges granted subject to a suspension no less than 190 were for a period of under one year, whilst in 1955 the corresponding figures were 349 and 263. That has to be considered in conjunction with the average time that elapses from the date of the petition to the date of the order of discharge. On examining the figures for 1955 in the High Court and those in one of the London suburban districts, it was found that respectively 67 out of 187 and 20 out of 53 were where a petition was filed either in 1954 or in 1955. That means to say that of these suspensions many of them were actually the bankruptcies which had occurred either the same year or the year before. - (Mr. King): What percentage is that in relation to the total bankruptcies in that year? It seems only a small number apply for discharge?

2265. You must remember that only one bankrupt in five makes an application. - (Mr. Pearlman): There had been a tendency since the end of the war on the part of all Courts to grant discharges much more readily than they did in the 'thirties. I can remember in the days of Mr. Registrar Mellor that bankrupts used more frequently to have their applications for discharge refused for years. Quite recently I had a case, I think in Hertford County Court, of an ex public schoolboy who had done three years penal servitude for embezzlement of his employer's funds. I got him an immediate discharge on the first application.

2266. Did you want to add something about discharge? - (Mr. Heap): Just to complete your amended scheme I come down to C 1, with which we agree. Under C 2, we again put the point which we put before, namely, that the opening words there should read "Whether a caveat is entered or not". The opinion of the Law Society is that the onerous duties should be made to apply generally to all bankrupts in order really to keep track of them.

2267. Do you think that the Official Receivers and trustees would be able to keep pace with that situation? - (Mr. King): It would only be for two years in the majority of cases, which is not a very long time. Most bankruptcies go on much longer than that.

2268. Is there not a disadvantage in making things just the same for the non-caveated bankrupt as they are for the caveated? I should have thought that would have robbed the caveat of a certain number of its terrors? - It is often desirable to get hold of a bankrupt for information about his affairs, but it is true to say there should be some dirt on him, I think.

2269. Mr. Emerson: Surely, when the two years are running out, the Official Receiver or trustee can apply for a caveat? - (Mr. Pearlman): I should like to know what principles would be applied by the Courts on an application for the entry of a caveat. The ordinary sort of caveat with which we are familiar now is the caveat which anybody enters as of right in the Probate Registry, but I rather gather from what I have read in HLA/112 and the previous document that whether a caveat will be entered or not will be a matter upon which the Court will exercise its discretion after having heard some evidence. Now if an application for a caveat is made some time after the conclusion of the public examination, probably it would then be heard by the Court and the bankrupt would be ordered to attend or given an opportunity to attend and show cause why a caveat should not then be entered. I can then quite imagine that there would be two "bites" at an

application for discharge: the first bite on the application to enter a caveat and, if that application is acceded to, another bite when the discharge is later applied for.

2270. Chairman: I do not think that it would be when the discharge is applied for because what we were contemplating was an application for a caveat either at the conclusion of the public examination or at any time during the two years when the discharge had not been applied for. I think the answer to your question as far as we can tell at the moment would really be this, the Court ought not to enter a caveat unless it is of opinion that on the facts before it the discharge ought to be suspended for more than two years. - I rather feel myself that at the conclusion of the public examination of the bankrupt there is rarely sufficient material in the hands of the Official Receiver and of the trustee to enable him to present an adequate picture to the Court, because it is only after the public examination, which follows quite swiftly upon the receiving order and the order of adjudication, that the trustee or Official Receiver really gets down to work for the purpose of investigating the bankrupt's conduct thoroughly and of getting in his property.

2271. I should have thought myself in most cases the Court has a pretty complete picture of the man they are dealing with by the time his public examination is concluded. - Speaking from my own practice and acting for trustees rather than for the Official Receiver, it is only after the public examination is concluded that I find I am coming across things which make it necessary to have private sittings, sometimes of the bankrupt, and to make investigations of transactions which might involve settlements which may be void under Section 42. The public examination has been concluded several months beforehand. I am just speaking from a practical point of view.

2272. Is this an argument in favour of the longer period? - It is in favour of the longer period and of course by way of enquiry on the general principles to be applied when the application is considered by the Court if made after the conclusion of the public examination. The other point which I have in favour of the period of five years is that it sometimes happens - I think Mr. King can give more figures than I can on this - that between the date of adjudication and the date of discharge property, by way of after-acquired assets, comes in as a result of the death of a parent or other relation of a bankrupt. That in my view is another reason which does support the five year period.

2273. But do you think it is right that a man's discharge should be held up merely in the hope of some property coming in? - I think in principle, unless the bankruptcy is due to mere misfortune, that it should be held up, but it would always be open to the bankrupt under the scheme, whether the period of suspension is five years or two, immediately to apply for his discharge at the conclusion of the public examination under the present system.

2274. We are not proposing to interfere at all with his right to apply. - I realise that. That is why I say there can really be no harm in the period of five years which we recommend. - (Mr. Heap): Perhaps I may add this. As a matter of policy from the Law Society, I can assure the Committee that this period was the subject of long consideration and debate. There was room for more than one view about it. You have submitted two years: we venture to submit five years.

2275. I think we can take five as the extreme in one and two in the other other. - (Mr. King): There is no provision, as far as I can see, where the public examination is dispensed with.

2276. We have actually dealt with that. - In B 1 application may be made for a caveat. It does not say who by.

2277. I think you got that from the earlier document. At the conclusion of the public examination we are not proposing to limit it to the Official Receiver and trustee. Are you in favour of continuing the creditors right the way down? - I am.

2278. Have you considered the possibility of vindictive creditors wasting a lot of time and money and making applications after the public examination? Do you remember a case called *re Genese*? Is not that possibly the answer? If the Official Receiver will not move and the creditor has really got a genuine case for asking for a caveat, he can borrow the Official Receiver's name on giving him an indemnity. - If provision could be made for that to be done that would meet the question.

2279. It is so now. The Court can authorise the Official Receiver to lend his name to an application by the creditor. - I think it is doubtful whether the Courts would welcome such an application if they were given specific power. They would probably turn it down automatically. The Court would take a different view of the application if it was done in that way rather than if power was given direct to the creditor.

2280. It might do. We would have to consider that point. I am much obliged to you for pointing it out. - The other point on these existing bankruptcies is that we have to guard against the search question. How are people searching to find out whether a man has got his discharge or not? I think the present search probably covers most of the points which will arise. In the case of a second bankruptcy where he does not automatically get his discharge the search form will not reveal whether he is discharged or not. (Search form passed round).

2281. Surely you are talking about a bankruptcy existing under the present Act at the moment. The creditor now makes a search and finds that there has been a previous bankruptcy; then the scheme for automatic discharge does not apply? - I think that search form will cover all the contingencies of a man not obtaining his discharge. - (Mr. Heap): Those are all our comments on the amended scheme.

2282. I think the next subject you deal with is the case of the second or subsequent bankruptcy. We have got really three choices before us. One is to leave things as they are, which is what you suggest. Another is to let the creditors in the second bankruptcy have the assets in that bankruptcy till they are paid 20s. in the pound. A third alternative which was suggested to us was that the assets of the second bankruptcy should go to the second lot of creditors until they get a dividend equal to that paid in the first bankruptcy and that after that, everybody should share alike. - A dividend at an equal rate?

2283. Each creditor proportionately has the same rate and after that they share equally. - We thought one of the effects of the law as it stands at the moment is to make it very unattractive to a creditor who knows there is an existing bankruptcy to make the man bankrupt again as his chances of getting anything out of it are very small indeed. We are afraid the result is that a lot of people who ought to be are not made bankrupt a second time. - (Mr. King): There will not be many, will there, in future because of this automatic discharge scheme. Your third alternative seems fair enough.

2284. Ought one not to bear in mind that it is the credit given by the second lot of creditors which in all probability has enabled the after-acquired assets to be there at all? It is their credit which is creating the second lot of assets. - Yes, you might get such cases, but then you might get an interest falling in after the first bankruptcy.

2285. You might, but taking it by and large, apart from windfalls, it is the credit given by the second lot of creditors which has created the second lot of assets. - I think it is unlikely that the trustee in the first bankruptcy will pick up any assets the bankrupt has been able to obtain from the creditors. I think it is extremely unlikely. The kind of assets a trustee picks up are interests which fall in, like interests under wills.

2286. Mr. Emmerson: If the first bankrupt has a life interest, that still remains an asset of the first bankruptcy, so it is only a windfall that could come in the category you mention. - I have not come across

cases where the assets have been provided by new creditors. -
(Mr. Emerson): I thought it happened quite frequently.

2287. Mr. Peirce: What about a builder trading a second time? - If he is an undischarged bankrupt, he will not acquire any assets, will he?

2288. Chairman: Perhaps they do not know he is an undischarged bankrupt. - Then he is committing a criminal offence.

2289. Are the second lot of creditors to suffer for that? - It is rather rarely the trustee in the first bankruptcy will pick up assets of that nature.

2290. Supposing we were in favour of amending the law, which way would you like it amended - 20s. in the pound to the second lot or dividends of equal amounts to both lots of creditors, thereafter each lot sharing equally? - I should think the dividend would be the fairest way of dealing with it.

2291. We thought it might be the fairest, but perhaps the most difficult in practice. - (Mr. Heap): I think we must admit here, as a matter of policy from the Law Society, that there are two sides to this matter, and the thing is fairly evenly balanced. - (Mr. King): There is a small point mentioned in Williams on this Section 3. That is a new Section. It gives the trustee the right to prove in the second bankruptcy. It does not divest the trustee of after-acquired property until the making of the order of adjudication in the second bankruptcy. He gets the right to prove on the making of the receiving order in the second bankruptcy but he is not divested of the after-acquired assets until the adjudication order is made. Supposing a scheme intervenes, he is given the right to claim under that scheme but is not divested of the after-acquired assets. It is an anomaly. It is not the intention of the Section, is it? How the Section should be applied could be easily corrected, of course.

2292. We shall have to look into that. Thank you, Mr. King. As to monetary limits, you want to increase the petitioning creditor's debt to £100 and limit the ceiling for summary administration to £750? - (Mr. Heap): Yes. It is to cover the fall in the value of money; that is all there is to it; to bring the matter up to date.

2293. Do you think it is worth really increasing the petitioning creditor's debt by a mere 100 per cent? - Yes, we do.

2294. Would you have any squabble with £1,000 as the summary cases ceiling? - Instead of £750? No, I do not think so. I think that figure was once mooted as a matter of fact. There was a great argument. We rather compromised at £750. I do not think we would object to that. There was no particular magic in the £750.

2295. I do not know if you have anything to say about the ceiling for necessary wearing apparel and so on under Section 38? - We have mentioned that, later on in page 12 of the memorandum. We suggested increasing the amount from £50 to £75.

2296. Bearing in mind that it must be in every case something which is necessary, do you see any objection to leaving it to the discretion of the trustee and the Official Receiver to decide what may be retained, because what is necessary for a man with a large family might not be necessary for a man who is a bachelor with no family? - I think it is an impressive argument, which must be given weight.

2297. I am not quite sure whether our memorandum to you was not a bit misleading about after-acquired property. We thought that the trouble about the decision arrived at in Re Pascoe arose where the after-acquired property is of an onerous character. Supposing the bankrupt goes out to a pet shop and purchases a white elephant. It is rather hard the trustee should be saddled with that. He does not want the thing and, if it is

his, presumably he has got to feed the brute until he can get rid of it. - (Mr. Pearlman): Would he not have the ordinary rights of disclaimer?

2298. As there are doubts on that point, we thought that they should be removed. The majority of trustees in bankruptcy we have examined are in favour of getting rid of Re Pascoe so that the trustee has a right to claim after-acquired property instead of having it automatically thrust upon him. Would you be very hostile to an amendment in that sense? - (Mr. King): No, I think it is a very sound idea, but the trouble in these cases often arises out of "intervention".

2299. We thought of using the word "claim" instead of "intervention" as being a less ambiguous word. - Yes, I think that would be an improvement on "intervention".

2300. I suppose what would be necessary in order to constitute a claim for property would depend rather on the nature of the property? - Yes. It would be easier to define whether a trustee claimed a particular piece of property rather than intervened. - (Mr. Pearlman): The difficulty with this word "claim" or "intervene" is that I would agree with the word "claim" in any case where the trustee knew of it, but it so often happens that property becomes after-acquired in its present sense without any knowledge on the part of the trustee that it has become vested in a bankrupt.

2301. That is one of the troubles. He may have vested in him a lot of property and he knows nothing about it. - That is why we were in favour of retaining the present system.

2302. I do not follow that. He may have vested in him property of which he is quite unaware. Is that not very inconvenient? - If he is given the right to disclaim it at any time, even within a limited period after he first becomes aware of it, the inconvenience would disappear.

2303. Mr. Emerson: I think the point is that, if he fails to disclaim, he is guilty of contempt. - (Chairman): That should bring to the trustee's knowledge any property the bankrupt has acquired. - It should, but unfortunately as we all know not every bankrupt is as honest as all that. He wants to save what he can.

2304. A person who goes to prison for contempt is not kept in for a very long time. If he has a very substantial sum for after-acquired property it might be worth his while doing twelve months. - Indeed it might in some cases. It is that sort of thing we would like to prevent. It is only when the bankrupt comes to dispose of his after-acquired property. If it be land the solicitor acting for the purchaser will, on making a search in the Land Charges Department of the Land Registry, ascertain that the man is a bankrupt.

2305. You do appreciate all we were wanting to do about this was to revert to what was thought to be the position before Re Pascoe? - I appreciate that, but the thing which we would like to see is to prevent bankrupts concealing their after-acquired property until after having got their discharge.

2306. As regards the appointment of the Official Receiver in a non-summary case, we thought that would be done very simply by the alteration of the word "shall" to "may" at the appropriate point, the present position being that if creditors do not elect anybody else the Board of Trade "shall" appoint some fit person. If we made it "may" they would be entitled to do what in fact they do now. - I think we would be quite content with that.

2307. I think it is better than actually enabling them to appoint the Official Receiver who is the servant of the Board of Trade? - (Mr. Heap): Yes.

2308. The next point we were asking about is really a question in which expediency and ethics come into conflict. Do you think that where the man pays 20s. in the pound, probably through the intervention of a rich uncle, plus interest and costs, it should be obligatory for the Court to annul the adjudication, or do you think the Court should have discretion in the matter? - (Mr. Pearlman): We are of the opinion that the Court should bring the matter automatically to an end. I know of at least two hard cases where the man has paid his creditors 20s. in the pound plus interest and costs, and because he did not behave as he should have behaved in his bankruptcy he did not get his discharge.

2309. I think you are in agreement with us about enlarging Section 51 to cover all possible sorts of income. - Yes.

2310. That brings us in your memorandum to deeds of arrangement. Do you see any need to register a deed of arrangement which neither conveys property to a trustee nor covenants for the conveyance of property to a trustee? - I do not think we applied our minds to this question. May I enquire if you mean a pure deed of composition?

2311. No, merely a pure letter of licence, or a pure deed of inspection. Such things are unusual but they do happen. - I have never had one in fact. Mr. King has not.

2312. They are rare. - I have read about them. Beyond that I have never seen one. - (Mr. Heap): Perhaps we can think about that and speak on it next time.

2313. Broadly speaking, you are in favour, are you, of increasing the control of the Board over deed trustees? - (Mr. King): Yes, I think it is desirable, and at the present time in 99 cases out of a hundred it works very well. There ought to be that overriding control. I do not see why it should not be done by adopting some of the present bankruptcy sections.

2314. You think they could be adopted? - I think so.

2315. Is it not important to bear in mind that the deed is after all a private contract? People ought to be able to make what contracts they please. - You know what creditors are. Once they have lost their money they are inclined to let things go and leave it to the trustees.

2316. There certainly is that tendency. If it is necessary for a trustee in bankruptcy I do not see why it should not be necessary for a trustee under a deed of arrangement. - Perhaps in voluntary liquidation the trustee should also give security.

2317. You mean the black square on the board is the Companies' Act - both squares are black, they should be white-washed? - (Mr. Pearlman): I am in wholehearted agreement with what Mr. King says and I think Mr. Waterer will remember a case where we had a receiver under debentures who had been appointed by certain clients of mine, and the Inspector General asked me to persuade my client to remove that receiver. The receiver is now bankrupt having been removed from all his trusteeships by the Board of Trade long before he became a bankrupt.

2318. Mr. Emerson: Is it the suggestion that ordinary receivers under debentures should give security, as well? - I was not suggesting that.

2319. Chairman: It really comes to this, that according to your theory, which we have been rather inclined to act on, the deed of arrangement is the creditors' own affair, and if they choose by the requisite majority, for example, to dispense with security, there is no reason why they should not. - Of course, there is the aspect that creditors are inclined to be kind-hearted towards debtors.

2320. Are they? - I think they are. I have seen many informal arrangements made for the benefit of the debtor, because when they are made the creditors feel sorry for the debtor. Then, when they investigate the matter through the trustees of the deed, they find themselves in the unfortunate position that they are bound by the deed, and the debtor has pulled a very fast one.

2321. We had a suggestion made to us to cover that sort of case, and I do not know what you would think about it. It has been suggested that there should be a power, where a debtor has been guilty of misconduct in relation to his affairs, to put the whole matter into bankruptcy, notwithstanding the assent to the deed. - I think we suggest that.

2322. You have got a suggestion on page 5 which comes to very much the same thing. Paragraph 5 on page 5 is very similar to the suggestion which we have already had. I forget exactly how we have worded it; it was that a resolution of the creditors and an order of the Court had to be obtained. Is that not right? Do you not think the idea of a resolution of the creditors followed by an order of the Court, before the thing could be pushed into bankruptcy, is probably sounder than the one you suggest? - I would not object to that at all. - (Mr. Heap): No, we would not object to that.

2323. The two points you have made are, first, the abolition of the power to dispense with security and, second, that the trustee should be under a duty to make returns to the Board of Trade. Substantially, I think, we have provided in our draft of the Deeds of Arrangement Act very much what you are suggesting there about returns. Periodical returns would be the idea, would they not, and a final account when he has wound the estate up completely? - (Mr. Pearlman): Similar to that of a receiver appointed by debenture-holders, or a receiver under order of the Court, or a liquidator. - (Mr. King): Similar to Section 92, is it not? - (Mr. Pearlman): Yes.

2324. Mr. Emerson: You are suggesting there should be a Board of Trade audit, and the creditor would have to bear the costs of that? - Yes.

2325. Chairman: What we provisionally provided for was an audit, if any creditor or the debtor applied for it. Would that not be good enough? It would not happen in every case, where it might be quite unnecessary, but the trustee would always have the threat hanging over his head that somebody might ask for an audit. - (Mr. Heap): Yes, I think we would agree with that.

2326. I see you would like it if all deeds of arrangement were gazetted. - (Mr. Pearlman): Yes, we think that would be very convenient. At the moment, if one wants to take advantage of a deed of arrangement as an act of bankruptcy, it is most inconvenient, but if they were gazetted all a solicitor need do on the hearing of the petition is to produce a copy of the Gazette containing the advertisement.

2327. That would mean giving a good deal of publicity to a deed, which it does not get at the moment, does it? - Technically, it is supposed to have that publicity; in fact that is the object of registration under the present Act. Every person who enters into the deed finds that deed published in two papers - I believe they are called Kemp's and Stubb's Gazette. The trade seems to know about it, and our suggestion is really to put into an official paper that which now appears with more publicity in an unofficial paper.

2328. In other words, it would not really make any difference? - It would not make any difference or do any harm, but reduce the ultimate cost to anyone presenting a petition, and also to the creditors generally.

2329. I do not see any difficulty in requiring deeds to be gazetted. I think that is quite a simple matter, if it is desirable. - We submit that not only is it desirable but it would be convenient, because the

present method of proving a deed, on a petition in bankruptcy, is quite archaic. You have got to get an office copy of the deed, and you have got to produce evidence that the person named as the debtor is the debtor named in the petition.

2330. If it is the same address, do they still insist on that? - Yes.

Someone has to swear an affidavit that the debtor named in the deed is the debtor against whom the petition in bankruptcy is presented, and he has got to get an office copy of the deed from the Board of Trade.

2331. It is rather cumbersome, is it not? - That is why we suggest a copy of the London Gazette containing the statutory information should, of itself, be sufficient proof of the commission of the act of bankruptcy for the purpose of the petition.

2332. You would still have to have some evidence of identification, would you not? - I would not dispense with the evidence of identification, but only of the need to get office copies of the deed of arrangement.

2333. Yes, I do not see why that should not be done. - Thank you.

2334. I do not quite follow why you want Section 146 of the Law of Property Act altered. - (Mr. King): A trustee under a deed of arrangement is handicapped. He cannot get relief against forfeiture.

2335. But in almost every deed leaseholds are not assigned. - They are not assigned, but it applies. If power is given, the trustee could apply through the debtor for relief. The debtor would have to make the application for relief, because the lease would still be in his name, but there is no reason why the trustee should not have the benefit of that relief Section.

2336. I do not think we could do more than simply draw attention to it in our report. We are not asked to advise about amending the Law of Property Act. - It might be a very valuable asset.

2337. What I was thinking just now was, if a leaseholder goes bankrupt the lease vests in his trustee, whereas under the ordinary deed of arrangement it does not, because he does not assign the lease; he only holds it in trust for the trustee. Does that make any difference? - No, I do not think so. The lease still remains with the bankrupt, but it would be automatically forfeited if there were a clause in the lease for forfeiture.

2338. For forfeiture if there were a deed of arrangement? - Yes, and a trustee should have the right to require the debtor to apply for relief against forfeiture - it would have to be in the debtor's name - but he has not got that right.

2339. Mr. Emerson: Has he not? - No, because the Section does not give relief.

2340. If the debtor holds it as trustee for the deed trustee, surely he is bound to do what the deed trustee tells him? - But Section 146 does not enable relief to be given under that Section, in those circumstances. That particular Section only applies to a bankruptcy, not to a deed of arrangement.

2341. Chairman: We shall have to think about making a recommendation in our Report. That is the only thing we can do about that. I do not think we can strictly do that, but I suppose we can draw attention to it. - (Mr. Heap): We shall be very happy to leave that with you.

2342. I see you want to undo Re Casse. - (Mr. King): It seems rather curious that you have got one set of rules for proofs in bankruptcy, and another one for deeds of arrangement. I should have thought that it was better to bring them into line.

2343. But as a deed of arrangement is a private contract, it is open to those who enter into it to put in or omit anything they like. - Yes, they could provide in the deeds, but most people are unaware of the distinction.

2344. I do not know what you would think of this. I should have thought the proper course would be to accelerate the rights of a contingent creditor to petition in bankruptcy, if the act of bankruptcy is a deed of arrangement which does not give him the right of proof. He cannot petition at the moment, because his debt is not payable immediately or at some certain future time, but it would be possible to amend that Section so that, if the debtor has executed a deed of arrangement which does not give him the right of proof as good as he has in bankruptcy, he should be entitled to petition on it. - That would meet the case, to a great extent.

2345. I think I appeared for the unsuccessful party in *Casse*, but I am by no means convinced that the result is wrong. What happened in *Casse* was that it was held, on the construction of that particular deed, that a contingent creditor was not entitled to take any benefit out of it. - I do not think many trustees know of that position.

2346. I think there is something to be said for it being a case of hardship if a creditor is a contingent creditor. All the property is given to the trustee by the deed, and he has got no right of benefit under the deed. I should have thought he ought to have. He ought to be given in those circumstances the right to petition in bankruptcy, and we could do that, or at least we could recommend that that should be done. - Yes.

2347. Your next point about trustees under deeds of arrangement is that they should have the same qualifications as a trustee in bankruptcy. There, again, we come up against the question that it is a private contract, and is there any reason why the creditors should not have anybody they like as deed trustee? - (Mr. Pearlsman): Yes, because one gets some peculiar persons appointed as trustees, whether in bankruptcy or elsewhere, and they have no qualifications at all. They tout around, and they call themselves accountants. They are not subject to any professional discipline of any kind, and on the whole I do not think anyone would quarrel with our statement when I say that they are not *persona grata* anywhere. I am not referring to the case where a person who is a creditor is appointed a trustee. I am referring to the general cases where trustees in bankruptcy are appointed, or trustees under deeds of arrangement are appointed. They have in each case certain statutory duties to perform, and as accountants in qualified societies they have to pass examinations covering the subject matter of deeds of arrangement, and the law of bankruptcy, and it is desirable that persons who are appointed as such should have some qualifications.

2348. The curious thing, so far as I remember, is that every single body of accountants who have given evidence before us - I mean qualified accountants, not those people who call themselves accountants - have been against restricting trusteeships in bankruptcy to professionally qualified persons. The Incorporated Society suggested it, but all the others were against it. - From the public point of view, and from the point of view of public morality, I think the public ought to be protected against these unqualified people by Parliament.

2349. Would you say it is comparable to the case of the quack doctor? - I think it is comparable, and also comparable to the unqualified solicitor.

2350. Mr. Emerson: Would it meet your case if anybody who had been disqualified by the Board of Trade from acting as trustee in bankruptcy were also disqualified from acting as trustee under a deed? - I do not think that goes quite far enough, because the Board of Trade are very loath to refuse to certify a particular person as a trustee, unless there is positive information against him.

2351. Chairman: You think it should be that in every deed of arrangement the trustee should be a member of one of the officially recognised bodies of accountants? - We do.
2352. We were proposing to abrogate the rule under which the creditor can be a trustee in bankruptcy. I take it you would agree with that? - I would not object, myself, to a creditor being a trustee. We have not discussed that between ourselves, as a matter of policy, but I cannot see any reason why a creditor himself should not be a trustee.
2353. I do not see any reason why he should not be a trustee under a deed, possibly, but the difficulty in bankruptcy seems to be that it is almost impossible for him to adjudicate fairly on his own proof. - That is so, and in addition to that there are a lot of onerous duties which devolve upon a trustee, and I cannot see how any unqualified person can properly consider any of the very technical questions which arise. The Court has to be protected as well as the public, and the Court would have the advantage of qualified people appearing before them.
2354. That is a point, certainly. - On the same point I might add one other thing that, as the law stands, if a person who has no professional qualifications touts for a trusteeship, and is not found out until a long time afterwards, it is then too late to undo what has been done. If a qualified person does that, a professional body will take cognizance of it on receiving the complaint, and that I suggest is an additional argument for the appointment of professional persons as trustees.
2355. The same thing applies, and it is also an argument against employing quack doctors or amateur solicitors. - (Mr. Heap): That is just the point.
2356. When you are speaking of the Land Charges Act and the Rules under it, on page 5 of your memorandum, paragraph 6, what you contemplate is a statutory amendment to the Land Charges Act, is it not? It would not be in the Deeds of Arrangement Act itself, would it? - (Mr. Pearlman): I think it would require a slight amendment to the Land Charges Act itself, which created a register of deeds of arrangement at the Land Registry.
2357. The most we could do about that would be to make a recommendation, because we are not allowed to tamper with the Act itself. - I think that is so but at the moment there is no provision for the cancellation of the entry. It is an anomaly.
2358. Yes, and something ought to be done about it, because, if under a deed of arrangement he pays in full, there ought to be nothing left on the Land Charges Register. - It ought to be capable of being removed. For example, an order for adjudication in bankruptcy can be removed if the adjudication is annulled.
2359. In fact, we were proposing to say that the Court should direct the removal of all such entries. - On an order dismissing a petition the order for dismissal expressly so provides. - (Mr. Heap): May I say that on pages 4 and 5 I must admit we venture to put forward these further recommendations, and it may well be that we have gone rather outside the strict scope of this enquiry, but they were matters which came up in the course of our deliberations, and we thought we would like simply to draw your attention to them. It may well be that you cannot go further than recommend.
2360. That is what I was thinking of. Our concern is the Bankruptcy and Deeds of Arrangement Acts. - We thought they were not entirely relevant, but we wanted to direct your attention to them.
2361. I am very much obliged. We will pass, if we may, to your suggestion of an act of bankruptcy which can only be committed by a solicitor. - Yes, this is the only case where we have suggested some increase in the number of acts of bankruptcy. The paragraph is, I think, self-explanatory. The great worry of the Professional Conduct Committee

is the delay which does occur because, try as they might, there is bound to be this delay, often as much as three months, before the procedure is carried through and in that time all sorts of things can happen. The Council have come to the conclusion that the mere freezing of the accounts under the Solicitors Act, 1941 is not adequate to meet the circumstances of the case, and therefore we do make this recommendation that where there is a freezing order that should operate as an act of bankruptcy.

2362. What you want would be to add as (i) under what is now Section 1, subsection (1), something of this sort: "If the debtor is a solicitor of the Supreme Court, and an order is made against him under paragraph 5 of the First Schedule to the Solicitors Act, 1941". That is all you want? - That is so.

2363. It seems to me that the difficulty begins, really, at the second stage. You want that to be an act of bankruptcy on which the Council of the Law Society, and only the Council, can present a petition? - Yes.

2364. Are the Council creditors? - (Mr. King): That is the point. We have been thinking about this since we put this down. We are now looking round for a debt, I think.

2365. I was puzzling about this and I jotted down this, which you could add under Section 4. This will be a new subsection (4); you have only got two, at the moment, and we have put in another one making three, so this will make four: "Where an act of bankruptcy is the making of an order referred to in section" - which would now be 1(2) (i) - "of this Act, the Council of the Law Society should be deemed for the purpose of the petition to be a creditor for £50" - or whatever the petitioning creditor's debt is - "and shall alone be entitled to present a petition". - (Mr. Heap): I think that meets our point, if I may say so.

2366. So it means you have got to put in a fictitious debt? - Yes, we must.

2367. And a unique provision that only the fictitious creditor should be entitled to petition? - That is so. In these special circumstances, which are outlined in that paragraph, we do ask for that.

2368. Mr. Emerson: What happens if a trustee rejects the proofs? - (Chairman): That is why I put into this draft ".... deemed for the purpose of the petition to be a creditor". They do not afterwards have to swear the proof that the defaulting solicitor is justly indebted to them, which would mean the Council committing perjury on every occasion. - (Mr. King): Of course, they do stand in the shoes of the client creditors, in so far as they pay those client creditors out of the indemnity fund.

2369. But they would not have paid the client creditors at the stage we are contemplating. - (Mr. Heap): I think there is a real difficulty. We have not gone far enough with what we are asking for here.

2370. I cannot help feeling with you that there may be all sorts of little difficulties which none of us have thought of as yet. I have only provided in this tentative draft that they should be creditors for the purpose of the petition; that means that the extraordinary situation arises that you get a receiving order, and then there is the first meeting of creditors which nobody from the Council can attend, because they are not really creditors. - (Mr. Pearlman): Can I help you there? There is a paragraph on page 50 of the current edition of Williams, which states

"By section 2 (8) of the Solicitors Act, 1941, where the Law Society has made a grant from the Compensation Fund (set up under that Act) to any person incurring loss through a dishonest solicitor, the society is subrogated to any rights and remedies (1) to which that person is entitled against the solicitor personally or any person administering his estate on death or insolvency; or (2) to which the solicitor himself is entitled against a third party; and the person receiving a grant shall not receive anything in the solicitor's bankruptcy until the Society has been reimbursed the full amount of its grant".

Then an editorial note says:

"It appears probable that the Law Society would itself be entitled to present a bankruptcy petition in its own name to recover the amount of its grant".

2371. I am much obliged, but the trouble at the moment is that the only thing which has happened is a freezing order, and the grants to the victims of the defaulting solicitor are all in the future at the moment? - Yes.

2372. You could get over it, at all events, in that way, by a statutory provision of a fictitious debt of £50, or whatever else the figure may be fixed at. - (Mr. King): There would be difficulty if there were no other creditors, would there not?

2373. As a contingent creditor cannot petition, we cannot serve the purposes that the Law Society has in mind, except by this machinery. Later on there will be one fictitious debt, at the date of the petition, and a genuine contingent debt when it comes to proof. - (Mr. Heap): I wonder, as we are trespassing at this end of the table into new ground, if we could just think a little further about it. We will have an opportunity of meeting you on two subsequent occasions, and perhaps addressing you, briefly, on it later on.

2374. Yes, certainly. It is very much unexplored territory at the moment. - Yes, it is.

2375. We do not know what we shall find in it. - It is a great problem, and I would emphasize that it is of great concern to the Council of the Law Society. We thought we would like to do something about the inadequacy of a mere freezing order, if we could.

2376. Whilst we are on this painful subject of defaulting solicitors, have you any views about this? Supposing a solicitor goes bankrupt and there is, presumably in his own banking account - not his clients' account - a sum of money which can be traced and shown to be a fee or fees payable to Counsel. At the moment, there is no right of proof in respect of those fees. Do you think that there ought to be a provision somewhere in the Act that if those sums are identifiable there should be a right to payment in full, on the ground of their being trust monies? I appreciate that the case can very rarely arise in practice, because they are usually hopelessly intermixed with other monies. - (Mr. King): There is a very substantial case pending now, where Counsel's fees have not been paid by a defaulting solicitor, but it will not come to the Courts. - (Mr. Heap): I think the answer to your question is, yes.

2377. I should have thought so. Oddly enough, the General Council of the Bar do not seem to want it. - There is a strong moral claim for it. I think the answer is, yes.

2378. I do not know that it is necessary to put anything in, in view of the fact that trust money does not vest in the trustee. Perhaps it would be a convenient point to break off until Wednesday. - I think so.

(The proceedings were adjourned)

Wednesday, 31st October, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.B. PEIRCE, O.B.E., J.P.	
MR. B.E.P. MACTAVISH	(Joint Secretaries)
MR. C. ROY WATERER, I.S.O. }	

(For Law Society's written evidence see page 334 above)

EXAMINATION OF WITNESSES

Mr. Desmond Heap, LL.M., L.M.T.P.I. }	Representing the Law Society
Mr. Gilbert Arnold King	
Mr. Sidney Pearlman	
Mr. Geoffrey Bender Proudlove, M.A. }	

Called and examined

2379. Chairman: We were dealing last time with your suggested new act of bankruptcy and petition against a solicitor. Why do you want the Council of the Law Society to be the only person who can petition on that act of bankruptcy? - (Mr. Heap): It arises out of the matter of professional discipline which is rather centred on the Law Society. The Law Society is responsible for securing discipline throughout the profession. This new act of bankruptcy arises so much from matters of discipline that it was felt it should be left exclusively in the hands of the Law Society. We are asking for this additional act of bankruptcy in order to strengthen the Law Society's hand, and only the Law Society's hand, in dealing with professional discipline.

2380. Surely, if you get your act of bankruptcy, in the unlikely event of some outside creditor being prepared to present the petition, would that not save you trouble? - We are the only ones, of course, who can bring about the freezing order. It is keeping the control of the matter in our own hands that we are very keen about here.

2381. On the other hand it would be the only act of bankruptcy in which there was any distinction as to the petitioning creditor? - We are aware of that, and we are asking for it really to help us with our running of professional discipline. We put our request in that way.

2382. I think if any other profession wanted similar treatment it is up to them to come to us and apply for us to recommend it. - You realise that this is a matter which particularly involves clients' money; that is the background to this quite unusual request which we make here. I think Mr. Pearlman would like to add a word. - (Mr. Pearlman): If I may add to these observations by saying, if this was an act of bankruptcy available to all and sundry as an act of bankruptcy, it would really be a dead letter because of the practical difficulty of any member of the public being able to establish proof of it for the purpose of a petition because, as I understand it, there is no publicity given to a freezing order. From a purely practical point of view, if the Law Society had obtained a freezing order, no creditor would be able to prove that act of bankruptcy unless the Law Society was willing to co-operate fully and give him the evidence to prove it.

2383. Supposing the Secretary of the Law Society was subpoenaed, he would have to come and prove it? - Before that, you have to allege in your petition that the following act of bankruptcy, to wit - has been committed and nobody would be able to allege in the petition that which is necessary before you can get someone to prove it. Therefore, if it was the general act of bankruptcy, I feel it would be a dead letter so far as the public was concerned.

2384. That would mean there would be no harm in making it a general act of bankruptcy although it would be very unlikely that any member of the public would avail himself of it. - I cannot see, speaking for myself, that there would be any harm because the public could not take advantage of it, yet on the other hand the Law Society, as Mr. Heap mentioned, does desire to retain control.

2385. Whichever way it is put, whether the right to petition is restricted to the Law Society or not, it is still an act of bankruptcy which could still be used for the purposes of the doctrine of relation back? - Yes, and it might be available for several acts of bankruptcy.

2386. It would be an advantage to the creditors? - I think it would be. - (Mr. Heap): May I add that this is a matter of very grave concern to the Law Society. As our written memorandum says, as much as three months or more may elapse before disciplinary procedure could be carried through, and a lot of damage can occur in that period of three months. Another point has not been mentioned so far. There is of course to be considered in this connection the compensation fund. As the Committee may know, the Law Society has established a compensation fund out of which compensation is payable to clients in cases where solicitors do the wrong thing. It is well known that by recent Act of Parliament the Law Society have had to increase the contributions to the compensation fund. There is an explanation for this which we need not go into today. It is a fact that the contributions have had to be increased. We feel that if we could have this stricter control over a matter of discipline it would lead to safeguarding the public generally, and also to safeguarding the compensation fund.

2387. I fully appreciate that. It seems to me the points of major importance are to create the act of bankruptcy, and secondly that the Law Society shall be deemed to be creditor for £50, and it is of secondary importance whether it is restricted to the Law Society or open to other persons, because in practice other persons will not be able to use it except in very exceptional cases. - There is a point on the matter of whether it is necessary for the Law Society to be put into this interesting position of being deemed to have a debt. I am not ready to offer you any help today but we are thinking about it and we are going to have some suggestions to make to you on Monday.

2388. It seems innocuous anyhow because, though you will ultimately have a right to prove in respect of payments out of the compensation fund to the injured clients, you cannot possibly tell, at the time you want to put the petition on, in pounds, shillings and pence how much that will amount to. It is a very interesting subject but you will let us have your final views on Monday? - We will.

2389. That brings us to your next suggestion which is that a judgment should include conviction for an offence involving money. The only difficulty I see about that idea, and it seems to me myself a very attractive one, is exactly how you are going to word the Section, because nearly all crimes involving dishonesty involve money directly or indirectly. Do you think it would be enough to say that final judgment should include a conviction for a crime resulting in a debt owing by the debtor to the creditor? - (Mr. Pearlman): Could it be taken by stages? If a person is convicted on indictment - say, for the moment, of larceny of a sum of money from his employer, then the employer, if he wishes to enforce that as a civil debt, must go through the solemn farce of issuing a writ and obtaining judgment to which the man can have no defence, although he may attempt to put forward a defence. Before we get to

bankruptcy, and taking the ordinary procedure, what we would like to see, although it may be strictly outside the terms of your reference, is that the person who has been defrauded, or the victim of the fraud, should be able to obtain a certificate of conviction from the Central Criminal Court, if the debtor be convicted there, take that along to the central office of the Supreme Court and then proceed to register that as a judgment in the same manner as today. If a debtor obtains his discharge subject to a judgment being entered in favour of the trustee for, say, £500, which he frequently does, that judgment is then entered as a judgment in the central office. So there we begin by having a judgment recorded in the central office of the Supreme Court. We know that a judgment entered pursuant to a condition of obtaining discharge may not be executed upon without the leave of the Bankruptcy Court. We suggest that such a judgment obtained or registered as the result of criminal proceedings should be a judgment capable of execution in the same way as any other judgment. Then the next step is, having become a judgment of the High Court, it will then be a final judgment for the purpose of Section, I think, 1(1)(g). I do not think you can go further than that.

2390. Could you not go by a shorter route and provide under Section 1(1)(g) that a conviction for a crime resulting in a debt by the debtor to the creditor should be included in the term "final judgment"? - That would be sufficient.

2391. That would mean you get your certificate of conviction. Instead of taking it to the High Court and registering it there you could take it straight to Carey Street and take out a bankruptcy notice? - If one goes as far as that it would be rather a curious position if only a bankruptcy notice and petition could be presented on such judgment and that the creditor would be deprived of the right of execution normally otherwise provided.

2392. Yes, but the one provision would be clearly within our powers and the other would be outside the powers of this Committee. - I fully appreciate that.

2393. I think it would be up to those who are responsible for the Rules of the Supreme Court to make any necessary modifications to ensure that the conviction could be executed on. - Really what we are suggesting here is an assimilation of the Continental procedure in which criminal proceedings are taken jointly with claims of civil debt and only involve one trial.

2394. It is a very good idea in principle, I think. We have to be rather careful about the wording because you would not, for example, be in favour of allowing a bankruptcy notice to issue on a judgment for stealing, not money, but money's worth? - No, I would not be in favour of that, but we have in mind the crimes of, say, fraudulent conversion, larceny from an employer, embezzlement.

2395. And false pretences resulting in obtaining money? - Yes. For that the man would have been convicted on indictment of either fraudulently converting the sum of X pounds or stealing the sum of X pounds.

2396. What about obtaining credit by a fraud? - I am not sufficiently familiar with the language of a criminal indictment for obtaining credit by fraud, but obtaining credit by fraud is generally a bankruptcy offence.

2397. It is the only offence in the Debtors' Act that you do not have to prove the man is an undischarged bankrupt. If it is of any interest to you, there is a very learned article in the last Law Journal about the distinction between obtaining credit by fraud and money by false pretences. There are two decisions of the Court of Criminal Appeal which are absolutely irreconcilable. Once you get him obtaining goods by false pretences or stealing goods, you are apt to get into an argument about the true value of the goods, and I do not think you can do that in the circumstances. It must be limited, I think, to money.

I was wondering also about obtaining negotiable instruments by false pretences. - I would like to see that but I envisage a number of difficulties. I think one must restrict it to obtaining money, otherwise you will have a man having a bankruptcy notice or petition put on against him for having done wilful damage.

2398. Supposing I go with some cock and bull story to Mr. Waterer and get him to give me a cheque for £50 and I succeed in cashing it and am duly convicted, then your procedure should be applicable? But if he discovers the fraud in time and stops the cheque, it should not? - That is right.

2399. I should have thought it would be safe to say final judgment includes conviction for a crime resulting in a debt owing by the debtor to the creditor. - Would it not be better to follow the statutory forms of indictment for this sort of offence?

2400. It means spinning out the Section to such inordinate length if you have to specify every single crime with particulars that would appear in the indictment. I was rather seeking a short formula to cover all cases. - I would like the opportunity to consider the language you would suggest to define a final judgment.

2401. Another suggestion you make is that a fine should be enforceable by the procedure of bankruptcy notice and I do not myself see why not. - I see no reason why it should not, because the Customs fines at the moment can be very high. There was a special statutory regulation, I think.

2402. Mr. Emerson: Under the Defence Regulations? - Yes.

2403. Chairman: I was wondering whether one could not make it comprehensive. I had thought of putting in, that final judgment should include a sentence imposing a fine, and also this other suggestion of yours, an order of a Court of summary jurisdiction directing payment of rates. But on subsequent thoughts I was wondering whether one could make it more comprehensive, and say, any order by any Court. That would include rates, fines, and indeed if the petitioner's solicitor was the petitioning creditor, the divorce costs. - I think you have some knowledge of the particular case to which we refer on the question of divorce costs. I think we share the recollection.

2404. Indeed we do, but that would go some way to meet the difficulty about divorce costs. - Of course the position in the case of *Re Cherfas*, in which we were both concerned, now under a *non de plume*, was that the Divorce Court created an artificial debt by ordering payment of part of a larger sum of damages to be paid directly to the petitioner, without any undertaking for payment into Court.

2405. There would not be any difficulty in appropriate cases in getting the Divorce Court to make an order in that form, and if you adopted this form of words it would enable the petitioner to issue a bankruptcy notice and in due course present the petition. - On that basis would the Divorce Court then be able to continue to exercise its control over the damages, which it still likes to do?

2406. No. I think that in so far as it makes the amount directly payable to the petitioner it loses its control, does it not? - Yes. We do suggest that there should be some way of enabling a petitioner to petition, notwithstanding that he has already given an undertaking to the Divorce Court to bring the money to Court, which at the moment is fatal to such a petition.

2407. You mean we shall have to amend the Section dealing with conditions on which a creditor can petition in such a way as to make it clear he does not lose his right by reason of any other undertaking? - Yes, and I think that was part of the argument of the other case.

2408. To come back to this suggestion of convictions and fines and so on, if we could find a comprehensive form of words to cover all orders directing the payment of money, that would please you? - That would, but from my recollection of having seen a certificate of conviction in a criminal court, say of the offence of larceny, it does not include an order of repayment.
2409. No, but you could put an artificial clause into the Bankruptcy Act that it should be deemed to do so. - That would cover the point.
2410. I do not know if you want to say any more about this question of conviction. It is obviously a matter which requires careful thinking over. - I have two more points on that. They are afterthoughts. Are you going to restrict it to conviction on indictment?
2411. I do not see why we should. Could it not apply equally to summary convictions and conviction on indictment. - It depends really in what part of the country the conviction may take place. If it takes place in a large city where there are a number of practitioners, then there may be no harm, but in more remote parts of the country injustice might ensue, as occasionally a person of low intelligence does, I believe, plead guilty to an offence of which he is not really guilty, in these remote police courts from time to time.
2412. Would not the remedy for that be that, when it comes to a petition, the Court would have the power to look behind the judgment? - If the Court is given that power, I would be content.
2413. It surely is inherent, is it not? I remember the Registrar being invited to look behind the judgment of the House of Lords on one occasion on a petition. - I do not mind them going behind it at all.
2414. I should have thought it was clear, without any amendment of the law relating to petitions, that the Court, on petition, could consider the question whether the conviction was right, including the case where a man pleaded guilty under misapprehension. - Is one not running into the danger of the Court saying the conviction was wrong?
2415. I am not unduly terrified of that myself. I do not see why it should not. The Registrar could say the House of Lords was wrong now, if he likes. - (Mr. King): The Court can enquire into any judgment debt, otherwise the debtor might consent to the signing of judgment and defrauding other creditors. - (Mr. Pearlman): The other point is that there should be some protection to the debtor or person convicted, that the judgment which is deemed to have been given against the debtor should not be enforced until the time limit for appealing against the conviction should have expired.
2416. Does he want any more protection if the judgment is on conviction than he has if the judgment is a judgment of the civil court? He can say "I am appealing and I want a stay". - Any Registrar sitting in bankruptcy would of course adjourn the petition until after hearing the appeal.
2417. Yes, almost as a matter of course. - Yes, I do not press that point.
2418. In the next paragraph we are dealing with the act of bankruptcy by seizure and holding. We were proposing to recommend that the act of bankruptcy should be the seizure, and to provide that the execution creditor should be protected if he can manage to hold for 21 days without notice of petition. I think that goes some way to meeting your point. It would make the proof of the act of bankruptcy a good deal simpler. You have only to prove that the execution was levied. - I am not applying my mind at the moment to the alteration in the basic law that the act of bankruptcy shall be the seizure. This paragraph 3 is only directed to the question of facilitating the burden of proof which could so easily be given by a certificate from the sheriff, or the sheriff's officer, in

preference to an affidavit sworn by the same man. That is the only point. Reverting to your suggestion that the mere seizure should be an act of bankruptcy, I think this might create certain injustices and I would not favour it, having regard to the consequences which can follow the commission of an act of bankruptcy. It frequently happens that immediately after seizure i.e. the putting into force of the execution, the execution is paid out. It seems to me to be wrong, therefore, to make this a new act of bankruptcy.

2419. The suggestion in your paragraph 3 is a very small matter we can deal with quite easily. - That was the only point to which the paragraph was directed.

2420. It is rather a matter that should be dealt with by Rules. - It can be dealt with by Rules provided the Rule is intra vires.

2421. I do not see why you should necessarily require any affidavit because after all the man in possession is an officer of the Court and acts on reports from his own officers. - He can be an officer of a different Court.

2422. He is a judicial officer anyhow. - Yes. We are only directing this to the method of proof.

2423. It is a matter for Rule really, I think. - I think so.

2424. I think the same applies really to what you say next. The doctrine that the Court can go behind the judgment on petition but not on hearing of an application to set aside a bankruptcy notice is again a matter of practice, is it not? - I think it is a matter of substantive law at the moment. For example, if the Court refuse to consider the application to go behind the judgment and did not apply its mind to it, I think it could be said that there had been no judicial exercise of the discretion.

2425. Possibly. I see you suggest, where the debtor or person alleged to be a debtor invites the Court to go behind the judgment, it should adjourn the matter to give him a chance to make application to set the judgment aside. I do not quite see what the advantage would be. Why should not the Court itself look into the matter straight away? - Once the Court begins to look into the judgment it might be running into a jumble of facts without any proper pleading. We know that is dealt with by an application in the High Court or County Court, to set aside the judgment regularly obtained. The Court hearing the application will, if they accede to it, do so on certain terms and those terms generally involve the condition that the defendant will bring into Court a sum of money, paying the costs. It is for that reason we suggest that it should be adjourned rather than adjudicated upon by the Court in bankruptcy. - (Mr. King): There is a danger that you get a fraudulent judgment between the two parties which the Court ought to enquire into. It affects the other creditors.

2426. It is the other creditors who are the victims of his fraud. - It might be a relative and he might get a judgment to which he is not entitled. - (Mr. Pearlman): The bankruptcy is for the benefit of all creditors generally and not one specific creditor. - (Mr. King): There might not be a debt. - (Mr. Pearlman): Then it would be examined by the trustee after the first meeting for the purpose of dividend.

2427. Do you really think the powers to amend a bankruptcy notice ought to be increased? - I think they should provided that no injustice comes.

2428. I know they are limited but after all the issuing out and serving of a bankruptcy notice is a serious step and I should have thought it was up to the creditor to have his tackle in order. - It can have silly results. I use the expression because I think it is silly in the sense that it is highly technical without any comparative advantage to the

debtor or to the creditors generally. There has been a judgment debt of £174 13s. 1d. The judgment debt was described in the bankruptcy notice as £174 13s. 0d. The debtor was required to pay £174 13s. 0d. instead of £174 13s. 1d. and that application to set aside the bankruptcy notice succeeded because the judgment debt was not properly described in the bankruptcy notice. To cover that sort of case I think there should be power to amend the bankruptcy notice, not by increasing the amount payable under the bankruptcy notice. We just feel that the Court should have a discretion on the subject.

2429. On page 7 of your memorandum, paragraph 6, you deal with the question of the fine and order for payment of rates. I think we have already discussed that and the comprehensive definition for the words "final judgment" to include these things, which would meet your point? - (Mr. Heap): Yes.

2430. And paragraph 8 - all those things hang together. We shall have to consider a definition of "final judgment" which will include all those things. - That includes paragraphs 2, 6 and 8.

2431. They all inter-link? - I think so.

2432. Paragraph 9 raises really a very small point. I do not know if you want to say any more about it. We have read your memorandum on the subject. - (Mr. Pearlman): I think the point is made sufficiently clear in the memorandum and if you are satisfied with it, I have no more to add.

2433. I think the point made by the Law Society is, where the act of bankruptcy is the non-compliance by the debtor with the requirements of a bankruptcy notice, the onus should be upon the debtor to show that he has satisfied the judgment, and not on the creditor to show that he has not satisfied the judgment; not on the creditor to show that the judgment is still in force. - That is precisely so.

2434. This matter on page 8 is quite clearly outside our terms of reference. - We just thought it rather hard, if the petition should be dismissed, that some poor debtor has to pay such a high fee.

2435. Some poor creditor. - Or creditor, but frequently it is the debtor who pays if the petition is dismissed by consent, because the debtor pays out the petitioning creditor together with his costs of the petition. There is a public examination in other cases.

2436. If there were a power to appoint a person other than the Official Receiver as interim receiver, would it not result in some duplication of costs? - The sort of receiver we have in mind in paragraph 11 is a receiver who will just preserve the position without imposing upon the debtor the stigma of bankruptcy which the appointment of the Official Receiver as interim receiver now has.

2437. Mr. Emerson: What rights would the interim receiver have? - Such rights as the Court might confer upon him by the order appointing the receiver, in the same manner as a receiver appointed in an action to collect the rents and profits and hold them pending the determination of the ownership of the rents and profits on trial.

2438. Chairman: Any person who owes money to the estate and is approached by the interim receiver will necessarily know there are some proceedings in bankruptcy pending? - That is provided that they should, but when the Official Receiver is appointed as interim receiver now he proceeds to do for all practical purposes what he would do immediately after a receiving order.

2439. Is that not to the advantage of everybody? - It is anticipating the making of a receiving order and for that reason the Court is disinclined to appoint an interim receiver unless it is pretty certain that a receiving order will ultimately follow, and it is not quite protecting

the position in the same way as the position is preserved in an action, say, over the ownership of property.

2440. I do not think the comparable thing is the receiver appointed in an action, surely the comparable thing is the existing powers of the Official Receiver as interim receiver, with the unofficial interim receiver whom you suggest. It seemed to me really the same thing under a different sort of label. - We do not press that point strongly.

2441. Another quite small point is that you want the Official Receiver to have power to appoint a manager off his own bat, so to speak. - (Mr. King): It is a question of convenience really. There seems no reason why the Official Receiver should not have that power.

2442. Except of course that the appointment of a special manager necessarily involves some expense and I should have thought in most cases the Official Receiver would be rather reluctant to incur that expense on his own responsibility, without anybody asking him. - I suppose you could protect them by an indemnity by the creditors. - (Mr. Pearlman): Our suggestion is that the Official Receiver can do it if he wishes to do so without referring to the creditors, but in practice normally he will only exercise that right if he feels sufficiently protected.

2443. Have you ever met a case where an Official Receiver wanted to appoint a manager and no one had asked him to? - (Mr. Heap): The answer is no, we have not.

2444. Mr. Lloyd Williams: I gather you are not pressing that paragraph either. - No, I think not.

2445. Chairman: On your paragraph 13, have you ever heard of the power under Section 12 being applied? - (Mr. King): To my knowledge I have never heard of it being applied.

2446. It is quite true, it may be unnecessary in view of the general power to rescind given by Section 108(1), but Section 12 is, as it were, quite harmless, is it not? - Yes, it gives the Court a discretion, I suppose.

2447. It overlaps with Section 108(1)? - (Mr. Pearlman): The case on the point here I think is *Re Rothfield*. He was made bankrupt in England and in Scotland. Then I think he devised the idea of filing petitions against himself to avoid committed orders on judgment summonses and successful applications were made to rescind the receiving orders.

2448. You do agree in fact the Section does not do any harm even if it is unnecessary? - (Mr. Heap): I think this is another case which we are not going to press. - (Mr. King): It is unimportant.

2449. When you framed paragraph 14 of your memorandum, had you by any chance overlooked the existing Bankruptcy Rule 187? It gives power to the Official Receiver to extend the time. Something to that effect has been there a long time. You have some doubts about the validity of the Rule, have you? - (Mr. Pearlman): Yes, my Chairman suggested I should express the view which I hold, that Rule 187 is at the moment *ultra vires* because Section 14, sub-section (2), which requires the debtor to file the statement of affairs within a certain period of time, gives the Court power, and the Court alone, power to extend.

2450. You mean the Rule gives the Official Receiver power to do something which by the Act is limited to the Court? - Precisely so.

2451. It would meet your point - "but the Court or the Official Receiver may extend the time"? - Precisely.

2452. Mr. Emerson: On paragraph 14, I do not quite follow this question of the payment for the preparation of the statement of affairs. If the assets are insufficient to pay for it, where do they come from

out of the estate? I am afraid I do not follow that. - I would be in favour of letting the Board of Trade provide one of its officers to do the statement of affairs in some of these cases.

2453. You say in your statement "at the expense of the estate" and previously you say "where there are not sufficient assets". - If we add - "at the expense of the estate, if any". - (Mr. Heap): We have that in.

2454. Mr. Lloyd Williams: But in fact surely now one of the clerks or officers in the Official Receiver's department does help the debtor? - Yes.

2455. Mr. Emmerson: I do not see how it can be at the expense of the estate if the estate has no assets. - (Mr. Pearman): I think it is an inconsistency in our language.

2456. The existing state of affairs is fairly satisfactory, is it not?

At the moment a clerk or somebody from the Official Receiver's office, a clerk or examiner or someone does help to prepare the statement? - It depends on the kindness of the examiner, but I think sometimes debtors can be helped, particularly when they are not very educated.

2457. Chairman: If we may pass to the next point, I do not myself quite see the advantage of altering the language of Section 15(4) so as to enable only a creditor whose proof has been admitted to question at a public examination. If the debtor has not filed the statement of affairs he can be dealt with. The four day order is usually made and if he does not apply he is committed. That is adequate, is it not? - Yes. We do not think it could be done otherwise, because of the possible injustice to the debtor. It is directed to avoiding possible abuses. At the moment the person - I will not call him a creditor at this moment - can, after a receiving order, having mailed proof of debt by post to the Official Receiver, attend at the public examination and question the debtor freely so long as the Court may permit, and all he has got to do is to tender a sworn proof. That proof might be the subject of considerable contention between the debtor and the creditor, and of continuing contention. We feel that, before a person should be entitled to cross-examine the debtor at his public examination, there ought to be some safeguard to prevent a person, before there has been some sort of adjudication upon his proof, from exercising the right conferred upon him by subsection (4) of Section 15.

2458. Would not your recommendation have the effect possibly of excluding a good many genuine creditors from the right to examine the debtor merely because there had not as yet been time to consider and adjudicate proofs? - With respect, no.

2459. This is advocated for the purposes of voting, I see. - For the purposes of voting merely, either wholly or in part.

2460. Supposing the proof had not been tendered in time for the first meeting? - The Official Receiver could still say that this particular proof, if it had been received in time, would have been admitted for voting and thereby give the creditor the right to be heard.

2461. That means we would have to create some sort of machinery under which the proof could be hypothetically admitted for voting purposes though it was tendered too late for the first meeting? - That is so.

2462. It would be rather a strange piece of machinery, would it not? The idea would be, he sees the notice in the paper, tenders the sworn proof of debt to the Official Receiver who says "It looks all right, I should have admitted it for the purpose of voting if it had been in time"? - That is right.

2463. Mr. Emerson: I have not followed where the injustice to the debtor comes in. - Anybody may attend and question the debtor, provided he had tendered proof before the public examination.

2464. Yes, but where is the injustice in the questioning? Where is the injustice to the debtor that somebody is able to ask him questions? - We will ask the debtor questions which are on points wholly irrelevant to the issue. - (Mr. Emerson): The Registrar can stop him if he is asking questions which are wholly irrelevant.

2465. Mr. Lloyd Williams: Are we to assume the debtor is more honourable than the creditor? - No. The point I am trying to make is that questions can be put to a debtor by a person who should not be authorised to put them.

2466. Chairman: Yes, provided that person is a busybody or perjurer. - He need not necessarily be a perjurer; it can be someone who feels he has a bona fide claim, a right which nobody would concede.

2467. Mr. Lloyd Williams: It is one of the few things the creditor has rights on, is it not? - I do not press this, but I have heard abuses by people having put in proofs for next to nothing, for example proofs which have been subsequently disallowed, taking up an enormous amount of time of the Court on cross-examination of a debtor in a matter in which the alleged creditor has not been at all interested.

2468. Chairman: Whether the thing is left as it is, or altered, there is always the chance of abuse, I think, is there not? - There is always that chance but there is no remedy there for this sort of abuse.

2469. In the other part in which you deal with Section 15 of the Act, you want the word "specially" deleted, before "employ a solicitor". Does that matter? In point of fact the receiver never does. - There is one small point, dealing with subsection (4), that the person examining the debtor must be his representative authorised in writing. We feel it is unnecessary that the person questioning the debtor should be the authorised representative in writing of the creditor. For example, counsel or a solicitor, on the construction of this Section, could be called upon for the authority in writing of the creditor.

2470. The counsel produces his brief. - That is so, but not in the case of solicitors. It just seems anomalous that that should be in, because I do not think it is the practice of Courts in bankruptcy to permit unqualified persons to appear as representing creditors.

2471. What would you like "the creditor or solicitor or counsel on his behalf"? - Yes, that is quite adequate protection.

2472. That would definitely exclude the amateur lawyers, or a partner, or a director of a limited company, or a husband for a wife. - He could send a partner.

2473. We might consider cutting out the words "in writing". You are not worried about the deletion of the word "specially", are you? Subsection (5) is pretty well a dead letter. - (Mr. Heap): No, we are not very worried about that.

2474. Subsection (6) - where the trustee is not in fact ready to go ahead, the examination should be adjourned until he is? - Yes.

2475. Might not that in effect involve compulsory adjournments at the insistence of a dilatory trustee? - The Court will insist that they do go ahead and order the officer of the Court to deal with it at a certain date.

2476. Your suggestion is that the examination should not be concluded until after the trustee has had an adequate opportunity for preparing himself? You think the Court should make up its mind what opportunity

would be adequate, to say "Another three weeks will be quite enough for you. We will adjourn till three weeks from now and then you must go ahead"? - Yes, the Registrar taking the examination would say "This is adequate time and you have got to be ready to deal with it".

2477. Mr. Lloyd Williams: Is not that a matter of practice for the various Courts? - (Chairman): I should have thought it was a matter of practice now with Registrars. Do you not think it might be better left to the discretion of the Court? - I have known cases of the public examination being closed within a very short time of the trustee having taken over from the Official Receiver.

2478. Mr. Lloyd Williams: Is not that the trustee's fault that he does not ask the Court to adjourn the examination? - It may well be the trustee's fault, but the burden generally falls upon the solicitor who comes in at a later date.

2479. There is still power to re-open the examination if the trustee applies? - There is the power to do so but it is rarely exercised and even then only in exceptional cases.

2480. Chairman: In fact I think the power to re-open a public examination flows from Section 108, does it not, the general power of the Court to rescind or vary any order made? - (Mr. King): Yes, Section 108.

2481. And it is used? - (Mr. Pearlman): It is used a lot, but not so much as regards public examinations.

2482. On compositions and schemes, your first suggestion is that it should be obligatory on the Official Receiver to apply to the Court for approval. If that is done no debtor would make the application, would he? He knows, if he leaves everything alone, the Official Receiver has got to make the application. - (Mr. King): There would have to be some provision in this as drawn here to provide for the payment of fees because there would be fees payable on these applications, and if this was adopted you could not expect the Official Receiver to make the application unless he was put in funds, so there would have to be some variation of this as drawn. - (Mr. Pearlman): On this paragraph 16, I suggest that, as a matter of practice after the creditors should have approved the composition it will be obligatory upon the debtor to deposit or cause to be deposited with the Official Receiver a sum sufficient to pay the approved composition and all Court fees payable on the application to the Court for the approval of the composition.

2483. What about the case of a scheme? He would then have to pay at least the amount of the Court fees? - Yes, and then the Official Receiver, on being put in funds to whatever extent may be necessary or proper, would bring the matter before the Court.

2484. Would there be any advantage in that over the debtor bringing it before the Court himself? - It is in the debtor's interest to do it, but these schemes are not very frequent. Putting it practically, if either Mr. King or I had a scheme tomorrow we would have to look it up. We would not be able to do it on our head. As Official Receivers have more practice of these things than anyone else, the Department could, I think, do it much more easily. As one goes more and more into the wilds of the country, there are fewer and fewer practitioners who have the experience to do these things, and we consider it would be more convenient to the Court hearing the application if the application were set down and prepared by the Official Receiver.

2485. You want there to be a discretion in the Court to dispense with the public examination where it approves the scheme? - That is as we suggest.

2486. As it is at the moment, the public examination has to be held and it is more or less a solemn farce? - It is a solemn farce, frankly, and if a man is going to the trouble to put up a scheme he does not want to put up a scheme if he has still to go through his public examination.

2487. But what we were provisionally suggesting at the moment is, it should not be proceeded with in cases where the scheme provided for payment of 20s. in the pound; but you would go further and give the Court power to dispense with it, whatever the amount? - Whatever the amount. I think there is a restriction, the amount of composition should be not less than 5s. in the pound.

2488. That is already there? - That is already there and we are not suggesting any interference with that minimal limit because the Court would have no power to approve the scheme if the composition offered were less than 5s.

2489. The prospect of getting out of this public examination would be an encouragement to a debtor to put a scheme forward if he could? - Yes, and from a practical point of view the scheme would be better unless the creditors saw a likelihood of getting more than in any other manner.

2490. The Court must have discretion of course? - Yes.

2491. You want subsection (13) amended so that the composition or scheme would be binding only on proving creditors? - Yes.

2492. Would that not have certain disadvantages? It means a creditor who has not proved could present a fresh petition and put the whole thing back into bankruptcy. - With respect, may I ask you to be good enough to read on. "Binding upon those creditors who have proved in the bankruptcy, or as the debtor may disclose in his statement of affairs".

2493. Before the scheme goes through of course there has been full advertisement of the receiving order and everything? - Only in the "London Gazette", and very few people of the general public buy that.

2494. Quite, but the trade papers reproduce it, I think. - A lot of them do.

2495. And the daily papers? - And some of the daily ones, but I do feel it should only be limited in this way because these things can be so easily overlooked. Then you get the case of personal representatives of a deceased creditor who do not take trade papers.

2496. I am not quite clear what you want done about the rights of the debtor over his property where the composition has been approved; must it not depend largely on what the terms of the composition are? If the Court rescinds the receiving order, it is clear that his rights revert as they were before the receiving order? - (Mr. King): Bankruptcy Rule 209 directs the Official Receiver to put the debtor or other person in the possession of the debtor's property.

2497. Of course we could put in some subsection to the effect that, where on approval of the composition or scheme the Court rescinds the receiving order, the rights of the debtor to his property, save as otherwise provided in the scheme, shall revive. But is that necessary, do you think? Rule 208 says that when making an order approving the composition or scheme the Court shall (a) discharge the receiving order, then (b) at the same time, unless it otherwise directs, making an order permitting vacation of the registration of the receiving order in the register of writs and orders affecting land. It has got to discharge the receiving order. Does that not make it clear that the debtor's rights as they were before the receiving order revive except in so far as the scheme otherwise provides? - (Mr. Pearlman): This recommendation is engendered from the observation at the foot of page 101 of Williams where the learned editor expresses doubts which we echo and, as a doubt is expressed in the text book on the subject, we feel the matter ought to be free from all doubt.

2498. Mr. Lloyd Williams: Are you in some doubt whether in fact Rule 208 is *intra vires*? - I think that in fact may be a necessary corollary of what we are saying.

(The proceedings were adjourned)

Monday, 5th November, 1956

Present

HIS HONOUR JUDGE BLADEN	(Chairman)
MR. H. BEER, C.P.	
MR. C.E.M. JAMESON, F.C.A.	
MR. H. PEIRCE, O.B.E., J.P.	
MR. B.E.F. MACTAVISH	} Joint Secretaries
MR. C. ROY MATHER, I.S.O.	

(For Law Society's written evidence see page 334 above)

EXAMINATION OF WITNESSES

Mr. Desmond Heap, LL.M., L.M.T.P.I.	} Representing the Law Society
Mr. Gilbert Arnold King	
Mr. Sidney Pearlman	
Mr. Geoffrey Render Proudlove, M.A.	

Called and examined

2499. Chairman: Gentlemen, there were one or two points in your memorandum on which you were going to give us your considered opinion today. -
 (Mr. Heap): Yes. I wondered if, with your permission, I could make a statement to you on a matter arising on page 5 of our memorandum, paragraph 1, where the Law Society has ventured to ask for a new act of bankruptcy. We have given some further thought to this point and I would like to put these observations to you. The freezing order, about which we are all aware, covers both the solicitor's office account and the client account, the client account of course being a trust account and not amenable to a bankruptcy matter. In re a Solicitor, (1953) Ch. 328 dealt with that very point. Of course a bankruptcy covers not only the solicitor's office account but all the solicitor's assets excepting of course the trust account. If the Law Society are going to get control over the client account that will necessitate the appointment of a new trustee in place of the defaulting solicitor. The Law Society do this usually by one of two methods: first of all, either by consent of the solicitor himself under some new deed of appointment which is arranged by the Law Society, or secondly by some order of the Court on the application of the Law Society made under the Trustee Act, 1925. To give the Law Society a locus standi to do either of these two things the compensation fund, which we know all about, pays £1 to a client creditor, and the Law Society is then subrogated to that client creditor and can itself then apply for the appointment of a new trustee of the client account. That new trustee is usually the Law Society's own accountant, one Mr. Saunders. That procedure, which goes on from time to time and whenever it is necessary, is limited in its operation purely to the client account of the defaulting solicitor. It is quite a limited procedure and it is usually deferred - this is the practice - it is usually deferred until the parallel procedure of some other person taking bankruptcy proceedings is completed. When that is done and a trustee in bankruptcy has been appointed, our Mr. Saunders of the Law Society and the trustee in bankruptcy are then usually appointed new co-trustees of the client account. But the trouble is this, this waiting for the completion of bankruptcy proceedings by some other party takes time, and the thing the Law Society is so worried about is the disappearance of assets in the meantime, because the freezing of the accounts does not stop assets

disappearing, particularly assets acquired after the freezing takes place. Moreover, the Law Society have met this: sometimes there is no other person who is disposed to move in the matter and start bankruptcy proceedings going, and sometimes it is difficult, I am informed, for the Law Society itself to move somebody else to take those proceedings. So it is felt in view of those difficulties - and they are quite real - that the Law Society should be given this power of itself having the freezing of the accounts made an act of bankruptcy on which the Law Society itself, and only the Law Society, should be entitled to lodge a petition in bankruptcy. Now why do we ask for that? The object of this new power which is sought is to enable the Law Society to act quickly in the very early stages of a solicitor's defaultations. The new power will enable the Law Society to set in motion the bankruptcy procedure and thereby save present and after acquired assets, and also to save time. It may be asked - I think it was put last time - why this power of acting in these circumstances should be solely for the Law Society. On that I would like to say this: the power to present a petition on the freezing order, based on the freezing order, if the freezing order is made into a new act of bankruptcy, should be confined, we venture to submit, strictly to the Law Society, because at that stage any disciplinary or other proceedings which the Law Society may have in mind against the defaulting solicitor will usually not have been concluded. For example, the information on which the freezing order has been obtained is confidential to the Law Society under the Act of 1941. The terms of that Act, paragraph 5, Schedule 1, empower the Council of the Law Society alone to apply for the freezing order, provided they are satisfied that the solicitor has been guilty of dishonesty as mentioned in that Act, Section 2. It is the same information which we submit should be sufficient for the founding of the application for a bankruptcy petition, and it is thought that it would not be right that any other body or person than the solicitor's own professional body should have such power as is now sought. After all, the thing we are discussing is a solicitor's professional position, it is his professional position which is being jeopardised. The matter may well still be before the Disciplinary Committee; as far as that Committee is concerned it is still a matter sub judice, and for considerations of that kind we feel that the matter should be open only to the professional body, namely the Law Society, which alone has power under the 1941 Act to do the freezing of the accounts. In other words, in so far as the Law Society itself is the only body that can freeze accounts under the 1941 Act, just so should the Law Society be the only body which could present a petition if freezing of accounts is going to be made an act of bankruptcy. If that be accepted the next question which arises is, where is the Law Society's debt on which it can present this petition? There I would like to say this: it may not be possible in every case to find some client creditor to come forward and claim on the compensation fund, and that may mean, if nobody comes forward to claim, that it will be impossible for the Law Society at this very early stage - and we want it to be at a very early stage - to take over the client creditor's debt so as to enable the Law Society to become possessed of the debt and thereby make the solicitor bankrupt. It may be difficult, I accept that that may well be so. In many cases the Law Society may be able to acquire the appropriate debt on which to found their petition. But just in case it should be difficult or impossible in some instances for them to get that debt and put them in a position to lodge a petition, I think it would be desirable to have a provision - and I think this was very kindly suggested by the Departmental Committee - it would be desirable to have a provision whereby the Law Society should be deemed in the circumstances we are talking about to be indebted for the amount of £50, the requisite amount, in order to found a petitioning creditor's debt. In many instances it may never, as I understand it, be necessary for the Law Society to avail itself of that debt, but just in case it should be impossible for it to take over the debt from somebody else I think it would be desirable for the Law Society to be put in the position of being deemed to have a debt worth £50.

2500. I have been thinking about that since we last met. Assume that we create this new act of bankruptcy and we provide that the Law Society alone may petition on it, there would be no need, would there, to relate the fictitious debt of £50 particularly to that act of bankruptcy?

It would strengthen the Law Society's hands, would it not, if it was deemed to be a creditor for £50 in the case of any solicitor who committed any act of bankruptcy? - Yes, I think so. - (Mr. Pearlman): There would be a difficulty there. If the Law Society were to put on a petition for the amount of the petitioning creditor's debt, be it £50 as at present or whatever sum you may decide to increase it to, I could see great reluctance on the part of any Court to make a receiving order if the debtor comes along and says: "Here is your £50 and also the costs of the petition", as so often happens now in the case of a petition in bankruptcy by a creditor. That is the difficulty I envisage.

2501. Then the Law Society, knowing of the act of bankruptcy, could not safely take the £50, could they, as another creditor might apply to be substituted? - But of course sometimes you have it that the Court brings every pressure to bear upon a petitioning creditor to accept payment of his debt and the costs of the petition, and indicates that if payment is not accepted the Court may, in the exercise of its discretion, dismiss the petition "for other sufficient cause". I have seen that so often and one cannot guess what the Court will do in the case of a petition by the Law Society.

2502. I do not think, if I may say so, that that quite answers the point I had in mind. Would it do any harm to give the Law Society a fictitious debt in respect of any act of bankruptcy by a solicitor? - Not at all. - (Mr. King): Even where there is no freezing order?

2503. Yes. Suppose a solicitor gives notice of suspension of payment, the Law Society might think it proper to put a petition on. - (Mr. Pearlman): There would be no objection to it at all. - (Mr. Heap): I do not think there would be any objection to that.

2504. Have you anything further to say on that? - (Mr. Pearlman): I would like to add four points in support of Mr. Heap's arguments for this new act of bankruptcy. First, the freezing order which is made the act of bankruptcy is a judicial act made by the High Court on an application commenced by an originating summons and duly served upon the solicitor, and he of course can oppose the making of that freezing order if he is so minded. There is the protection there. If he can show cause against the making of the freezing order before it is made then of course he would not commit an act of bankruptcy if no freezing order was made, so from that point of view the subject would have protection. Secondly there is the question of time. If a freezing order is made an act of bankruptcy one would not have the unfortunate position now that if someone wants to put a petition on, first of all it may be necessary to sue the defaulting solicitor to judgment and then issue a bankruptcy notice and then present a petition, which would take six weeks at the earliest; it is only the presentation of the petition which will enable a stop to be placed on the bank account. Thirdly, the subject will again be adequately protected from the act of the malicious presentation of a petition because that would not mean a receiving order would automatically be made; the Court must retain its inherent jurisdiction under Section 5 as to whether a receiving order was proper in the circumstances, and in the event of the petition being dismissed the Law Society as petitioning creditors would be subject to all the penalties of any other creditor, and the difficulties which every creditor might face, such as a civil action for maliciously presenting a petition. Fourthly, I would point out that the advantage of a petition is that it does not necessarily mean that the receiving order will follow, because the Court as I said earlier would retain its inherent discretion.

2505. But you still want the new act of bankruptcy to be so to speak your private act of bankruptcy? - We should like that.

2506. Do you not think we might make a short cut - the suggestion has just been made - by a provision on lines similar to Section 107, subsection (4) as it now is? Section 107(4) as it stands provides that a Court having bankruptcy jurisdiction can make a receiving order against a judgment debtor on a judgment summons in lieu of committal. Would it

not be possible also to empower the Court which makes a freezing order against a solicitor to make a receiving order against him at one fell swoop? - I am told that the application for a freezing order is made in the Chancery Division of the High Court.

2507. Yes, which has bankruptcy jurisdiction. - Which has bankruptcy jurisdiction. I cannot see that there would be any objection to that, but on an application for a freezing order I would like to see your suggestion adopted as an alternative method to a petition proper, again for the simple purpose of protecting the subject, because from a practical point of view when a freezing order is made it is not always present to the mind of the respondent and will not always be present to his mind that a receiving order in bankruptcy may be made at the same time.

2508. If you are going to ask for a receiving order at the same time as asking for a freezing order surely you would have to give him notice of that in your summons? - I should think one should, but I do feel that whilst I would like to keep that, accept your suggestion as an additional gift from the mouth of the gods, so to speak, I see certain difficulties with respect to it. First of all if one takes the events logically the freezing order will be the act of bankruptcy; on a judgment summons the Court will only make a receiving order in bankruptcy first if the creditor consents and there is evidence before the Court on the hearing of the judgment summons that the debtor is hopelessly insolvent. I myself have never experienced an order made under subsection (4); I do not know if Mr. King or anyone else has.

2509. Of course this is a new idea as far as I am concerned, and as far as you are, but I do not quite see why if you had the power to make a receiving order on the application for a freezing order you would need to have your little private act of bankruptcy and your fictitious debt and all the rest of it. - Offhand I should not think so, but if that suggestion of yours should be adopted it might be desirable to provide that the Court in bankruptcy would have the same jurisdiction as the High Court now enjoys of making a freezing order.

2510. It might, yes. We must think that one over. - I have not thought it over myself, it just occurs to me that if a receiving order in bankruptcy is going to be made against a solicitor on such an application it might be better made by the Court in bankruptcy rather than by the Chancery Division.

2511. Supposing it is a country solicitor, surely if the Court makes a receiving order under the proposed subsection of Section 107 at the same time as making a freezing order the next thing it does is to transfer the bankruptcy proceedings to the appropriate Court. - Yes, it does, but the freezing order is made by a Master in the Chancery Division. An order under Section 107(4) must be made by a Judge. And whilst I would advocate conferring jurisdiction upon the Registrar of the High Court to make such an order, I would hesitate before advocating that the Chancery Masters should have such a jurisdiction. But, if I may suggest, following on Mr. Waterer's suggestion, it would be convenient if the Law Society were to be given the like powers as the Crown has of presenting a petition in the High Court wherever the debtor may carry on business, immediately the order is made the Court could then automatically transfer it to the appropriate County Court, because it would be very inconvenient for the Law Society and for those who normally advise the Law Society and have experience in this particular sphere if they are going to present a petition in bankruptcy based on this very technical act, to have to do so in a County Court, as there would be no uniform procedure. If it is only capable of being presented in the High Court there would be complete uniformity of practice.

2512. While we are on Section 107, I wonder if I might ask your views on a problem which came my way today. The order under subsection (4) can only be made by a Court having jurisdiction in bankruptcy; the result is, as I see it, that a London County Court dealing with a judgment summons cannot make a receiving order. - That is perfectly correct.

2513. Do you think that is a defect in the law, because it means the London judgment creditors are deprived of a right which country judgment creditors enjoy? - That is so, unless the judgment summons is heard in the High Court.

2514. Yes, that is true. Do you think that ought to be tidied up? - I think it ought to be tidied up.

2515. Curiously enough it happened that I wanted to make a receiving order against a person this morning, and I found I could not. - It would be very desirable that a County Court Judge in the Metropolitan area, or for that matter any County Court Judge wherever sitting, should have the same powers. If, for example, you sat today in Westminster and tomorrow at Barnet, that you should have no power to do at Westminster what you can at Barnet is absurd.

2516. I know, it is rather absurd. Do you want to say any more about this freezing order business? - (Mr. Heap): I was just going to add one point. You, yourself, were good enough to refer a few moments ago to what you called the Law Society's private act of bankruptcy, and I am not going to run away from that expression. The Law Society have had the hardihood to persevere in this application to you that they really should be given this private act of bankruptcy because it is the Law Society - I dare say the Committee have got this point in mind but I want to stress it again - it is the Law Society who have the responsibility by statute of running the compensation fund, and we do feel that we really must do anything we possibly can to give additional protection to that compensation fund. It is well known of course that the contributions to it have recently had to be doubled, and anything that will help to prevent the making away of assets in a way that the freezing order simply does not do is a thing which the Law Society thinks very desirable from their point of view. Therefore they venture to put before you this kind of machinery which we have outlined today.

2517. We will certainly bear that point in mind. - We shall be very greatly obliged if you would.

2518. I think the next point is the registration of deeds of arrangement? -

Yes. I think your question was, should deeds of arrangement be registered even if they only convey property. We were not looking at it at all, rightly or wrongly, in that way. We felt that the motivating factor behind the registration of deeds of arrangement was publicity; it was to secure notoriety to protect the public from dealing with a man who might not perhaps be able to meet his obligations. If it be accepted that publicity is the thing, then in our opinion they should be registered whether or not they convey property. - (Mr. Pearlman): I am in complete agreement that it is in the public interest that there should be as much publicity given to private arrangements with creditors, so that creditors may not give unnecessary credit without the remainder of the public being aware that the debtor has failed in some respect in the first instance.

2519. In your view then any arrangement between a man and his creditors as a body should be registered? - Definitely.

2520. You would go so far as to make the provisions requiring registration even wider than they are today? - I would, in the interests of commercial morality. I believe the Official Receiver in his questionnaire to a debtor against whom a receiving order is made includes the stock question: "Have you made any arrangement with your creditors?" If it is material to the conduct of a person adjudged bankrupt I think it is equally material to the public welfare. - (Mr. King): I am also in favour of these registrations; I think they are desirable.

2521. Being as wide as possible? - I think so, yes.

2522. I think we dealt last time with your views on compositions. The next point you make in your memorandum is that you consider that application for adjudication of bankruptcy seems unnecessary. I do not

know if you would like to say any more about that? It struck me that the point you make is a rather revolutionary one; an awful lot turns on the adjudication, does it not? - What we first suggested was that where the debtor consents then we could proceed as now, but where there is any difficulty and there is any obstruction by the debtor then I think there ought to be automatic adjudication.

2523. It has got to be gazetted. I do not see for one thing how you could apply automatic adjudication to the case where a receiving order has been made against a firm in the firm's name. The adjudication has got to be against named individuals, has it not? - Yes.

2524. It seems to me it would be impossible in that case to carry your proposal into effect. - Yes, we would not object to that, but in the ordinary case where there has been an obstruction by an individual I see no reason why there should not be automatic adjudication in certain events. Unless for instance within 28 days after the receiving order it has not been rescinded or a proposal has not been submitted for a scheme, then the receiving order could provide that he shall be automatically adjudicated.

2525. What is the object of the exercise of having automatic adjudication? I do not quite see what you gain by it? - To speed things up; to help to assist the Court, because it is nearly always automatic; to save all these applications.

2526. Do you think the Land Registry would like it? - It would not make any difference to the Land Registry, would it?

2527. Would it not? You do envisage the Court making an order, though making it automatically? - There would be a provision in the receiving order that in certain events the debtor should be adjudged bankrupt.

2528. Then before the Land Registrar would register anything he would have to be satisfied that those events had happened, and when they had happened, what is more, whereas now he gets a neat little adjudication order and he acts on it. - Yes, there is that point. - (Mr. Pearlman): If I might continue here, the suggestion which we have discussed between us and which we put to you is that the receiving order should contain a provision similar to a decree nisi in a divorce case, that unless cause be shown to the contrary within a certain period the debtor be adjudicated a bankrupt as of that date. One could provide as a caution that there will be no automatic adjudication in the event of an application being pending, a scheme being brought forward by way of a composition or an application for rescission of the receiving order, as sometimes happens, between receiving order and adjudication, and I think it would be necessary to exclude from this speeding up process the case where a receiving order is made against a partnership firm. But if one restricts it to an individual I can see a great deal of advantage, first to the creditors generally, secondly a saving of time to the Court which in 99 per cent. of the cases of individuals is really acting as a rubber stamp in making the order of adjudication, and thirdly the debtor will be protected because he can make an application for either an extension of time or he can show cause against the making of an order of adjudication.

2529. You would let him apply for the extension of time? - Yes, under the general enabling provision of the Section.

2530. Then the minute you grant that have you not really destroyed the similarity to a decree nisi? - With respect, no, because on an application by a debtor for an extension of time that would be dealt with before the time limited by the receiving order had expired, and if the Court should refuse to extend the time then the adjudication order would take effect automatically. On the other hand the Court has, I think under Rule 367, power to abridge the time in a proper case.

2531. There are so many exceptions to the rule, even as you envisage it, that it seems to me we are pretty well back where we started from. - I do not think so, because I think there has only been one case of an appeal against an adjudication order in recent years, and of that the Court of Appeal made very short shrift.

2532. Supposing we do not go quite as far as you want us to go and make the adjudication order automatic, would you be in favour of incorporating into a Section those provisions which are now a Rule, as to when a Court shall adjudge a debtor bankrupt. There are a whole lot of Rules including Rule 248 and the effect is really to split the provisions of the Act as to when an adjudication shall be made. - I would be in favour of incorporating that in a statute, and whilst on the same subject might I direct attention to the fact that Rule 389 gives the Court power either to extend or to abridge the time, yet in the Section as it now stands I do not think the Court has any power to abridge the time for adjudication.

2533. That only applies to time in the Rules, I think there is only power to extend time in the Act. - There is no power to abridge the time.

2534. Yes, only power to extend. - We direct attention to that for consideration, but express no view on it.

2535. If we may proceed to your views on the appointment of a trustee, I think we are agreed as regards (D) of your paragraph 18 that "may" should be substituted for "shall" in subsection (6) of Section 19, and that would do the trick as far as the Official Receivers acting in non-summary cases is concerned, would it not? - Yes.

2536. Apart from the appointment of professional people as trustees, which we considered last time, the other matter you deal with is the question of majorities: You point out that a liquidator is elected in a slightly different manner from a trustee. Would not the effect of your recommendation be to make it harder to carry an ordinary resolution and easier to carry a special one? - It may have that effect, but it does seem an anomaly that in the administration of the affairs of companies which are insolvent there should be one rule and in the administration of the affairs of insolvent individuals there should be another. At the moment any creditor with a large proof will swamp everybody else in getting his own nomination.

2537. That is why you want a majority in number as well as value? - That is so.

2538. Mr. Emerson: The same thing can apply in liquidation in effect; the shareholders nominate the liquidator, the creditors confirm that appointment. One large cash creditor can still swamp the rest on a voluntary liquidation, because unless you get a contrary resolution in number and value - you have got to have both - the shareholders' nomination cannot be upset. - I am applying it more in terms of compulsory liquidations, in which event the Court appoints the liquidator.

2539. Chairman: As regards your note on paragraph 19 about compositions after bankruptcy, subsection (1) of Section 24 seems to cover your point, does it not? - (Mr. King): I think it does. I do not think there is any real point on that one.

2540. If we may pass to control over the person and property of the debtor, we were proposing to recommend a provision which would require the debtor to deliver up his passport, but is it possible do you think to legislate against his obtaining a new one? - (Mr. Pearman): I think it is quite easy to do so, on the same lines that an infant child of parents who have been divorced cannot obtain a passport without the consent of the Court, in divorce proceedings.

2541. My recollection is that if you want to obtain a passport and you have ever had a British passport you have got to show what has happened to the old one, have you not? - Yes.

2542. As the bankrupt has had to deliver up his passport to the Official Receiver, I should have thought the Passport Office themselves would be pretty sticky about giving him a new one. - I think they would be sticky in issuing a new one, but it may well be - I have not studied the Act under which passports are issued - it is possible that a passport will be issued to anyone who is a British subject as of right.
2543. Mr. Peirce: He has got to get his application form signed by certain people who have known him personally for so many years, and he has had to make a statement on that application. - But a bankrupt even then, if he had surrendered his passport, would still be entitled to a new one unless he was in some way prohibited from obtaining one.
2544. Chairman: I should have thought, as things stand at the moment, having delivered up the old one to the Official Receiver he could only get a new one by a fraud, and you cannot effectively legislate against fraud. One of the things they always ask you, as far as I recollect - I do not know if other people's recollection is the same as mine - is whether you have had a passport before, and if so what has happened to it. - Yes, you have got to account for it.
2545. As regards your second paragraph under paragraph 20 we cannot very well, can we, recommend legislation to make people exercise more frequently the powers they have already got? - Not to make people exercise the powers they have already got.
2546. You say "greater use might be made of these powers". - Could it not be done as a recommendation by the Board of Trade to its Official Receivers that they might do so.
2547. That is not an amendment to the Act, you see. What we are asked to recommend is amendments to the Act. - As you please, we will not press that point.
2548. I do not think we can legislate against fraud, can we? What we could do by legislation, which I think you intend to suggest, is that there should be power in the Court to issue a warrant merely for failure to attend on the Official Receiver? - Yes, we suggest that.
2549. It is pretty drastic, is it not? Supposing he has missed his train, or has a cold? - The Court would not do it capriciously. It very frequently does happen that debtors fail to attend on the Official Receiver for a very long time.
2550. But the position now is, is it not, that if he does not attend on the Official Receiver the Official Receiver can get an order from the Court telling him to do so, and if he disobeys that then indeed a warrant is issued? - Yes, that is what happens in practice.
2551. Is that not good enough? - Yes, we think that is good enough.
2552. The main question you raise about Section 25 is as regards costs. This, as the pavement artists say, is all my own unaided work, the other members of the Committee have not considered it yet. Might I read you a suggested new subsection and perhaps you will tell us if it goes any way to meet your suggestions? "Whenever the Court orders a payment under subsection (4), or a delivery under subsection (5), of this section, or is of opinion that any information obtained by an examination under this section has been unreasonably withheld by the witness, the court may order that the costs of the examination (to be taxed as between solicitor and client if the court shall expressly so order, but not otherwise) shall be paid by the witness". - I think that would meet the case.
2553. I thought of suggesting to the Committee that we should go a step further and add: "In any other case" - that is where it does not order payment or delivery - "the court may order that the costs of the examination (to be taxed, if so ordered, as aforesaid) be reserved to the court or judge disposing of any action or motion to be brought or

concluded as a result of the examination". - Yes, I think that is an excellent suggestion, if I may say so. - (Mr. King): That would not be costs to the witness, would it? Could there be power to order the trustee to pay the costs of the witness?

2554. No, I was thinking of the other side of the picture. If the witness were ordered to pay the costs of the examination he would of course have to pay his own travelling expenses. - Yes. As the Section reads, I am not quite sure whether it would not give the Court power to award costs against the trustee - the second part of the Section.

2555. It has got that power now, has it not? Generally the trustee does not have to pay the costs. - I do not know whether it has or not, to tell the truth. I have never had one. There is nothing in the Section which provides for it.

2556. Surely if the Court is of the opinion that the application for the examination has been improperly made or anything of that sort there should be power to make the trustee pay the cost himself? - (Mr. Pearlman): I have known the Court exercise that power.

2557. So have I. That I think goes some way to meet your views about costs? - It does.

2558. I am rather startled by your suggestion that the Courts should have power to order payment or delivery in cases where the witness does not admit liability. - May I deal with that point from a matter which has arisen within the ambit of my own practical experience. I have had two cases in my office where, on examination of the witness, he has admitted every salient fact necessary to enable the trustee in bankruptcy to succeed in an action for the recovery of property forming part of the estate of the debtor, and to which the witness would have no defence on the trial of the action. I have in those cases invited the Court to make an order for the payment of the money in one case and delivery up of the property in the other case, but on each occasion I have been met with the question from the Court: "Have I any jurisdiction to make the order?", and I have been compelled to say on each of those occasions that I agreed with the Court, there is no jurisdiction to make the order because the witness has not admitted either the liability or that he must give up the property. The person or Court taking the examination of the witness is a judicial officer, and if facts which would not entitle a man to leave to defend on an application under Order 14 are put forward, or if no defence known to the law is put forward on such a claim except that the witness persists in saying: "I do not admit this property or money is part of the estate of the debtor", never mind how capricious he is in maintaining that, the Court has no jurisdiction to order payment, with the result that, being a matter pending in bankruptcy, one cannot take proceedings in the bankruptcy to do it. One must do it by way of action in the Chancery Division to enforce payment or delivery up of the property. And of course as we know the procedure there, by the time you have got your orders drawn up, passed and entered and perfected, is inclined to be very long drawn out. We do advocate that, in the simple case where there is really no apparent answer to the claim, the Court should then proceed to adjudicate upon it, and if the witness does not like it he has got his remedy by way of appeal.

2559. You really want the Court taking the public examination to exercise in effect those powers which a Master could exercise under Order 14, but as far as my experience goes never does? - I think he does exercise his powers under Order 14.

2560. I do not know; some of the remitted actions that come my way have not a shadow of defence. - I do not blame the Master there, I blame the representative of the parties who appear before the Master.

2561. Maybe that is the proper way to look at it. However, you feel that the Court taking an examination should have the power to make an order even though there is no admission, if it thinks that the admission

is being capriciously withheld? - Yes, and then in view of the Court, the facts are clear that the trustee would be bound to succeed.

2562. Is there any advantage in having an account not on oath, which it has been held the Court cannot order? If you can get an account on oath surely it is better, is it not? - I do not think the Court can even order an account on oath on a private examination. I do not think it has even got that power. - (Mr. King): It can in a way, because it can order a witness to produce one and he is under oath when he produces one. - (Mr. Pearlman): That of course, as Mr. King points out, is most inconvenient, because if a witness brings up a vast volume of books, to sit down in front of the Registrar taking the examination and extract the material from the account is very troublesome and you have not time to consider it at all. If the witness is ordered, between two adjournments, to bring in an account on oath you can then cross-examine him on the account at the next hearing.

2563. I thought the Court could not order him to furnish an account not on oath. It suggests, does it not, that the Court can order him to furnish an account on oath? - It does suggest that, but I have never been able to get an account on oath by an affidavit from a witness at all. You can only get it orally on the examination of the witness.

2564. I do not quite understand what you want under paragraph 21(D). There are considerably wider powers, are there not, under Section 25 as it is, for the Court to cause him to be apprehended and brought up for examination? - From a practical point of view the Court can cause him to be apprehended, and does, but what you have got to do is to make a substantive application to apprehend him after he has not attended.

2565. Then what do you envisage, that the Court will sit and there will be no witness, and the Court immediately says to the usher: "Go out and scour the public houses for him"? - No, I suggest this, which I am again applying from the practice. You have your order for your private sitting. Having served your order personally on the debtor you then have to file in Court the extra sealed copy of the order with a certificate of service endorsed upon it. If instead of that extra sealed copy being just with a certificate of service it is attached to an affidavit of service it will then be before the Court. The Court will then have evidence of service and the Court could then immediately, being satisfied that the witness has been duly served with the order requiring his attendance, proceed to direct that he be apprehended.

2566. But he might have been run over by a bus. The Court would not know anything about that? - I am trying to take the analogy of what sometimes happens, if a witness appears before a Court on subpoena. When the man's name is called in Court and he is not present, on proof of service of the subpoena the Judge will sometimes direct that the man be brought before him to prevent the Court being delayed in the continuation of the matter on which it is engaged.

2567. I see you want the debtor to be given a right of appeal from the trustee's decision in respect of a proof, but have you not got that power under the existing Section 80? - No.

2568. *If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court*. - I think I can direct attention to it. There is an authority saying that the debtor has no right of appeal.

2569. I expect you are thinking of re Dodwell. That did seem to weaken this Section very much from the debtor's point of view. We were proposing to try to get over that decision by amending Section 80, so that it reads "Any person (including the bankrupt) aggrieved by any decision, etc.". That would meet your point? - That would meet our point. Our reason behind it is that a debtor, on proof, might be admitted. - (Mr. King): Is it suggested that there should be any security of costs if the debtor appeals, because you might get these frivolous appeals by a debtor?

2570. I do not know about that. It is certainly a point for consideration. You suggest that there should be a clause in the Act requiring a debtor who wishes to appeal against the trustee's decision to furnish security? - I think he should.

2571. If you introduced a provision of that kind, you would be giving with one hand and taking away with the other rather, would you not? - It would be highly dangerous to allow this. You get some of these debtors who are very cantankerous and they put their creditors to all the trouble they possibly can. There would not be much chance of the creditor being able to recover his costs if he succeeded.

2572. On the other hand, there would not be much chance of the bankrupt being able to exercise his rights and furnish security. - (Mr. Pearlman): I think it is remarkable the amount of money bankrupts can find when required. - (Mr. King): I do not think creditors ought to be open to the risk.

2573. It could not be done by Rule presumably because the Act expressly gives the right to appeal and you could not whittle it down by Rule, so any such provision should be in the Act itself. I think it must be.

2574. I do not know whether you want to say any more about what you have said in your memorandum as regards cases under the Legal Aid and Advice Act. - (Mr. Pearlman): I can only illustrate this by a case I have had in my office very recently of two assisted persons obtaining a receiving order against a bankrupt. We feel that there should be some control over what an assisted person can do. At the moment, as we have said in our memorandum, there is a lacuna between the Legal Aid and Advice Act and the Bankruptcy Act. I believe that that is partly dealt with by directions of the Board of Trade to the Official Receiver, and we would suggest that it might be made the subject matter of statute. The other appeal of the matter is this: when a receiving order has been made and a trustee has been appointed, the Law Society has no vote at all in saying who shall be trustee or what shall be done or who shall be members of the committee. The case I have in mind is *Re Rousseau*. Mr. Waterer will tell you, if he cares to make enquiries, that there the assisted persons requisitioned a meeting of creditors to remove the trustee, and the Law Society had no say in the matter.

2575. Where do you think we should put this amendment to the law? Would it be convenient to do it in Schedule I and Schedule II? - To the Act?

2576. Yes. - I have not considered where it should go as long as it goes somewhere, but the way, if I may suggest, it might be dealt with is that an assisted person at whose instance a receiving order in bankruptcy is made or who is a creditor of a person who is an adjudicated bankrupt, should be in the position that his rights are automatically vested in the Law Society by way of subrogation, in the same way that a guarantor is entitled to stand in the shoes of the person whose debtor he has guaranteed on payment of the debt.

2577. Perhaps that would be the simplest way - to provide generally that in the case of an assisted person who is a creditor, the Law Society should be deemed to be a guarantor and to be entitled to be subrogated as in the case of an ordinary guarantor? - I think that would meet our point perfectly.

2578. It seems to me clearly right that the Law Society should have some control over what the assisted person or ex-assisted person does in bankruptcy. - We feel that because in the case in point the Law Society could do nothing. The Official Receiver had to carry out his statutory duties and convene this ridiculous meeting.

2579. Of course, there is Form 176 on which he can authorise payments of dividends to somebody else, but your point, I gather, is what if he will not play and will not sign it? - That is the whole point. These people just would not play.

2580. I do not know why, but the Lord Chancellor did not want to make a regulation in this case. Perhaps he did not appreciate the seriousness of the position at that time. Do you consider this a job for an amendment of the law in bankruptcy or an amendment of the law relating to legal aid? - We consider that the law of legal aid has already partially taken it to the extent that only the solicitor acting for the assisted person can give a receipt, but there has been no corresponding provision so far as bankruptcy is concerned.

2581. It does not really matter which way it is done as long as something of this kind is done? - (Mr. King): That is so. - (Mr. Pearlman): Something must be done, that is what we feel.

2582. The last suggestion about creditors' proofs is that the Official Receiver should be required to adjourn meetings if the rejection of a proof is made known at the first meeting of the creditors. Do you not think that the remedy there may be worse than the disease? Is it not likely to lead to lengthy and frequent adjournments? - I am again thinking in putting this point to you, of a case which, in my experience, has brought about injustice. True, it was a country bankruptcy. The Official Receiver, at the first meeting of creditors, rejected the proof of a particular creditor in the sum of about £75,000. The result was that that creditor, by reason of the rejection of the proof, had no say in whom should be appointed as trustee. Ultimately, he appealed against the rejection of the proof and the proof was admitted. But then the damage had been done - there was the trustee in whose appointment he had had no voice.

2583. Did he not throw him out and replace him? - No.

2584. Why not? It was within his power to change the trustee. - A new meeting has to be called. No new meeting was called on that occasion. And it was quite a substantial sum.

2585. I am thinking of re Cowan at Croydon Court many years ago. In fact, I thought you were reciting the facts of that case. - This was one at Sheffield.

2586. In re Cowan a new meeting was called and a new trustee was put in.

That surely is the proper procedure under the law at the moment? - No new meeting was called on this occasion - we had to put up with it. The difficulty which arose in that case was that the Official Receiver adjudicating on the proof could not make up his mind whether it was a contingent claim or a present claim and therefore rejected it.

2587. I do not know, but it seems to me that there must have been a slip-up there, probably in certifying the trustee while the appeal was pending. - That may be so. This was settled years ago and, without digging into old files, I would not like to be more precise than I have been.

2588. But even then, the creditor whose proof had been admitted by the Court would have been admitted because the rejection was void. He could have demanded and got a new meeting, dismissed the old trustee and put his own trustee in. There is plenty of procedure for it, if he wanted to. - I did not consider that aspect of the matter at the time.

2589. It might be used for delaying purposes by somebody, it seems to me. - Yes, one does not want to delay the trustee taking over.

2590. The friend of a bankrupt could put in a proof merely for the sake of getting a rejection and getting an adjournment. He has only to have his proof rejected and then he says: "Now you have got to adjourn the meeting". - I do not think I can press this point upon you further.

2591. I see you think that the provisions of Sections 2 and 3 of the Partnership Act should be incorporated in the Bankruptcy Act? - Yes.

2592. There are a lot of enactments, are there not, which postpone particular debts to the claims of other creditors? - We just direct attention to it here as this is a point which occurred to us, so that as much as possible may appear in one codifying Act.
2593. But you would not expect to find every single case where a debt is postponed set out in the Bankruptcy Act? - No, but this is one of them which I think ought to be.
2594. It is rather an important one, I agree. - We think it is.
2595. When we come to Section 38, we come on to ground which we have already, to some extent, covered? - Yes.
2596. I think you told us last time about your views on solicitor's client account being trust property, and we all agree that it is. - Yes. - (Mr. Neap): The suggestion in paragraph 24(A), of course, is only a declaratory point really, to make it clear that this account is, beyond all peradventure, a trust account. The difficulty is that there may be some profit costs which may give a chance of arguing that it is not entirely a trust account.
2597. I am very sorry, but I do not quite follow you there. - The solicitor has a lien for profit costs on the client's account, and to that extent it might conceivably be arguable that it is not a trust account pure and simple. We want it made abundantly clear by express enactment that money standing in the solicitor's client account - whatever he may call it - is a trust account.
2598. It would simply be a matter of introducing the words after "trust property" the words "including money standing to the credit of clients' account of a bankrupt solicitor"? - That is so.
2599. That is all you want? - Yes.
2600. I am not sure myself whether the matter of a bankrupt trustee or executor is one which should be dealt with under the Bankruptcy Act or under the Act governing trustees and executors. What do you think about that? - (Mr. Pearlman): We consider it should be the Bankruptcy Act.
2601. It is the practice of the Court dealing with trustees and executors, and so on, to remove them if they are bankrupt. - (Mr. King): Not executors - only trustees. The Trustee Act, Sections 36 and 41, deals with it. There is no power at all to remove an administrator or an executor.
2602. Supposing one is created by the Bankruptcy Act - who is going to act instead of the man who is removed? - There would be no difficulty in appointing a new trustee, somebody who is not bankrupt.
2603. But the new executor? - If the trustee in bankruptcy was beneficially entitled to any of the estate, he would be the person to be appointed. You get different types of cases.
2604. But the executor is the person selected by the testator. The testator ex hypothesi is dead. He has chosen to select somebody who is bankrupt or who has subsequently become bankrupt, and I do not quite know how someone could be appointed in his stead. He is the man chosen by the man who made the will. - Of course, he may not have been bankrupt at the time the will was drawn up. There is the difficulty, I admit, with regard to executors where the man has been selected by the testator, but, even so, it is certainly dangerous that he should have the power to handle assets.
2605. The only way to do it would be, would it not, to empower the Court to remove the executor on the grounds of his bankruptcy and then for somebody else to come along and get a grant of administration cum testamento annexo? - Where the trustee is beneficially interested in the estate,

there is no reason why he should not apply for grant of administration cum testamento annexo. In fact, where the trustee is beneficially interested in an estate, through the bankrupt he already has power to get a grant - which he does very frequently.

2606. But take the case where he himself is not beneficially interested. -

Then it would be a question for one of the beneficiaries under the will or intestacy to apply for the grant. But we are really more concerned from the trustee point, where a trustee goes bankrupt. There is already power to remove the trustee, but you do get these cases of husband-and-wife properties in their joint names; they are both trustees, and the trustee in bankruptcy is absolutely powerless. They both refuse to sell the property or to deal with it, and the trustee has no legal title at all to deal with that property.

2607. They are joint tenants? - Yes. If property is in the joint names of husband and wife and the bankrupt has a beneficial interest, say a half share, it is very difficult to realise that interest.

2608. But the trustee in bankruptcy surely has all the rights by way of partition or sale, and so on? - First of all, he has to go to the Court and ask for an order appointing somebody to be trustee in place of the bankrupt, and presumably asks for himself to be appointed. He then has to go to the Court and ask for an order for the sale of the property, and the Court, in all probability, will refuse to make an order where it is the matrimonial home. So the trustee is left, to all intents and purposes, without any remedy.

2609. That is the Law of Property Act - St. Thomas's Hospital and re Richardson. It is possible under that case, in certain circumstances - which I could not possibly remember and recite, they are far too complicated - for the Official Receiver to get hold of it. - Where the bankrupt is sole trustee and has a beneficial interest, then the legal estate may pass to the trustee. As a matter of fact, doubt has been cast on that case by a recent decision where the bankrupt only has a partial beneficial interest.

2610. I cannot help feeling that it is all a question of the law of property rather than the law of bankruptcy. - (Mr. Pearlman): May I intervene to say that what we would like to see is that the Court in bankruptcy should have a similar power to that which the Court of protection enjoys with respect to estates in which lunatics are interested, either as executor or trustee. If we begin with a disability to a person adjudged bankrupt acting as trustee or executor, then in the case of the sole executor the Court would then direct the trustee to apply for letters of administration if he was interested in the estate, or if he was not interested in the estate any other person interested in the estate could apply for a grant of letters of administration with the will annexed. Then as to ordinary trustees, if he enjoyed similar powers to those which the Court of protection has, the trustee could then apply to the Court in bankruptcy for the appointment of some other person as a trustee in place of the bankrupt. The only qualification we have to make there is that power is given to the Court by Section 54 of the Trustee Act to appoint a new trustee in the case of the lunatic, but we would like to see wider powers in the Court of bankruptcy than are given in the case of trustees. A further difficulty arises that, if an executor is not sole beneficiary under an estate but is a partial beneficiary, it is to the interest of the executor, when a bankrupt, to postpone the deadline when he ceases to be executor and becomes trustee.

2611. While we are on the subject of executors and administrators, we thought of abolishing the right of retainer in the case of administration of the estate of a deceased insolvent. Would you agree with that? - There you have the technical difficulty that a person cannot sue himself. I can see difficulties on that. I have not applied my mind to it personally, but I believe the right of retainer is contained in the Administration of Estates Act, 1925.

2612. I see you want the decision in re Walter extended to living bankrupts. I understand that that is, in fact, done in practice? - (Mr. King): Yes.
2613. But there is no reason why the butcher and the baker should be in a worse position than the undertaker? - No.
2614. What you suggest in paragraph 24(E), personally I am disposed to agree with. Section 38 - the property Section would be a convenient point at which to make some provision of that sort, would it not? - Yes, I think it would.
2615. As regards your last point on Section 38, we were proposing to recommend the abolition of the reputed ownership clause altogether. I do not know what your views on that are? - It is practically a dead letter.
2616. That is what we felt, these days. - (Mr. Pearlman): It is only a dead letter because there are so many limited companies.
2617. And so many hire purchase agreements? - Yes.
2618. Then it is really worthless as an enactment? - (Mr. King): I agree, I think it is useless. - (Mr. Pearlman): I would rather withdraw from that discussion because I am interested too much in the hire purchase side. I would personally rather not discuss that. - (Mr. Heap): Then, for the Law Society, I think we had better say that we agree with what you have said.
2619. I see what you say about Section 41. Actually, we were proposing to recommend a rather drastic modification of those two execution Sections for the purpose of simplifying them. Very briefly, the effect of what we thought of doing was this: first of all, to make the act of bankruptcy the seizure and not the holding for twenty-one days; secondly, to protect the execution creditor if he succeeds in holding for twenty-one days without notice of a bankruptcy petition. Those were two of the initial things we thought of doing, although a good many things are consequential on them. - (Mr. Pearlman): That means, if you protected the execution creditor and the seizure failed after the date of the receiving order having been held for twenty-one days, the execution creditor would be entitled to the benefit of the execution?
2620. Yes, if he managed to hold for twenty-one days without notice of a petition. - Are we not then treading on some rather tricky ground with respect to the Companies' Act - I think Section 325, or round about there - about the putting into force of an execution?
2621. I think we are, but we were only asked to recommend what we think ought to be done in the Bankruptcy Act. What we all felt - I do not know whether you agree or not - was that what was desirable with those execution Sections was, above all things, simplification. - There I agree.
2622. They are all very muddled as they stand. If we made a recommendation on those lines, there would be no need to deal with the problem which you raise - the debt of more than £20 being satisfied by instalments of less than £20? - No, there would be no need to deal with that.
2623. As regards Section 42, avoidance of settlements, if the man is insolvent at the date of settlement you can go back ten years under the law as it stands. Is that not good enough without extending the two-year period to three? - Except that, with the speed of modern existence today, it does sometimes take a long time to investigate the matter and then the statute of limitations is beginning to operate.
2624. Yes, it might operate. - I do not think there is any doubt about the operation of the statute. I have always considered that it would operate because the trustee would be in no better position.

2625. There is no enactment that it does not run against the trustee that I know of. - I consider that it would operate.
2626. If the settlor becomes bankrupt within two years of the date of the settlement, that means, does it not, at the very earliest days it is an act of bankruptcy? - Yes.
2627. The statute of limitations may be running, but, subject to that, the trustee has got plenty of time to look around, has he not? - May I put it in this way? A man can now avoid bankruptcy, particularly if he has many transactions, for a long time and he can so organise his affairs that by staving it off by more complex financial arrangements the effects of Section 42 within the two-year period would become a dead letter.
2628. Would it make an awful lot of difference to make it three years instead of two? - I think it would make a substantial difference because it is so difficult to say that a man was insolvent at the date he made his settlement. That is the difficulty which I envisage - and the practical difficulty of proof. I am reminded that if one relies on the ten-year period, the onus is upon the parties claiming under the settlement to show insolvency and it is often so very difficult to establish insolvency that it is better to rely on the two-year period now, which we would just like extended by one year.
2629. I think we are all agreed as regards Section 44: transactions between the date of the petition and the receiving order must be brought in. The present law is absurd, quite clearly. - Yes. - (Mr. King): Yes.
2630. In connection with so-called fraudulent preferences, would you like it if, say, during the last three weeks before petition, a payment which did in fact give a preference was made void against the trustee, whatever the intention? - (Mr. Pearlman): We should like that - and, of course, extended between petition and receiving order.
2631. Yes, certainly; that absurd lacuna has got to be filled, clearly. - (Mr. King): Would that mean that every payment within three weeks would be voided?
2632. No, not a payment for present consideration, for instance. If he buys a bun over a counter at a teashop, he does not, in fact, prefer anybody because it is payment for a current consideration. - Of any outstanding debt, in fact.
2633. Yes, that is really what it comes to. We were going expressly to except payment for current necessities - if he pays the weekly milk bill, or something of that kind. - Yes.
2634. You like that idea? - (Mr. Pearlman): Yes, we like that idea. - (Mr. Heap): We think that would be good. - (Mr. King): Three weeks is a little bit short.
2635. Whatever period is decided on, somebody will say that it is too long and somebody will say that it is too short. You cannot please everybody. - It is from the petition?
2636. Yes. - (Mr. Heap): Could we have a nice round period, like one month?
2637. Calendar or lunar? - Calendar, if you please.
2638. We can think out the possibility of extending the time. But you are agreed in principle that the idea is a good one? - Yes. - (Mr. Pearlman): Yes.

2639. The next matter you write about is one which will require a good deal of consideration, I think, so perhaps that would be a good place to stop for tonight, would it? - As you please, Sir. - (Mr. Heap): I think so.

(The proceedings were adjourned)

Wednesday, 7th November, 1956

Present

HIS HONOUR JUDGE ELAGDEN	(Chairman)
MR. H. BEER, C.B.	
MR. C.E.M. EMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.B. PEIRCE, O.B.E., J.P.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

(For Law Society's written evidence see page 334 above)

EXAMINATION OF WITNESSES

Mr. Desmond Heap, LL.M., L.M.T.P.I.	} Representing the Law Society
Mr. Gilbert Arnold King	
Mr. Sidney Pearlman	
Mr. Geoffrey Bender Proudlove, M.A.	

Called and examined

2640. Chairman: Good afternoon, Gentlemen. I wanted to refer to paragraph 28 of page 14 of your memorandum, where you make the point that a solicitor who is bringing or defending an action for a man when he gets notice of an act of bankruptcy by his client should be protected. - (Mr. Pearlman): As to his costs. At the moment the solicitor is only protected if he is receiving money from a man who has committed an act of bankruptcy, provided that the money is either for the defence of the bankruptcy petition or the defence of the man in criminal proceedings.

2641. Yes, and even then it is only by judicial decision. There is no Section giving protection. - No, it is only on the grounds of natural justice.

2642. Yes, quite. - What we suggest is that for the benefit of the estate in bankruptcy and for the purpose of avoiding injustice to a debtor, it would be as well to provide that a solicitor who receives money with notice of an act of bankruptcy for the purpose of, and continues to do work in connection with, an impending law suit, for the sake of argument, should be entitled to receive his costs notwithstanding the fact that he has notice of an act of bankruptcy.

2643. Where would you put it in - under Section 37? - I had not thought about it. Yes, I should say Section 37 would be a convenient place to put it.

2644. So we will make it Section 37? - Or Section 45, on protected transactions. Either Section 45, or it may be better in Section 46, validity of certain payments to the bankrupt and assignees.

2645. To the bankrupt? That is slightly off the point, is it not? - Slightly off the point, yes, it is really.

2646. I think probably a new subsection to Section 45 may be the best place to do it. - I think so.
2647. I think we all see the point you have made, that if natural justice requires that the man should be entitled to be defended in criminal proceedings or on a bankruptcy petition, he ought to be entitled to be defended if he is bringing in proceedings. - Yes. I will carry it even further. I have seen actions which were perfectly good ones dismissed because the man cannot continue and the solicitor will not continue because he has notice of an act of bankruptcy. I think that, for the benefit and the protection of the estate, there must be the right to tax the solicitor's costs for work done after that date.
2648. Yes, I think we have the point you make. If we decided to give effect to it, that would be the best place to do it, I think? - Yes.
2649. The next point you make is somewhat similar. It is an extraordinary thing that there is no protection to an executor who pays a legacy. - (Mr. King): There is no decided case on this at the moment.
2650. So far as I know there is none. - There is the Irish case, Ball, in favour of the executor, but doubt has been cast on that case. I think executors ought to be protected where they have no knowledge of bankruptcy, but only in those cases. Where they have knowledge then I do not think they ought to be afforded any protection.
2651. After all, the executor who pays the legacy is only perfecting the gift which the testator made. - Precisely, yes.
2652. If I see an undischarged bankrupt selling matches in the gutter and I choose to give him half a crown, the trustee cannot object to my giving him half a crown. - The title to the money vests in the trustee, does it not?
2653. Yes, I see. If the trustee chooses to intervene, it is his from the word "go", so to speak. If we substitute the "gazetting of the receiving order" for the "making of the receiving order", that would go some way towards meeting your point, but not the whole way? - No. The position is dealt with in the after-acquired asset Section, is it not?
2654. What about a share of an intestate estate? - The same thing applies - exactly the same thing. Trustees never make searches in bankruptcy as a point of practice.
2655. I was just going to ask you - they do not? - They never do.
2656. It would make an awful burden on them if they have to. I have been an executor twice in my life and I have cheerfully paid legacies without any enquiries at all as to whether people are bankrupts or not. I have just realised what an appalling risk there is. Section 47 would be the place to do that, if we decided to do it, would it not? - Yes, Section 47.
2657. We thought of making a substitution of the word "claim" for the word "intervene". - (Mr. Pearlman): Yes, we agree with that.
2658. As regards your suggestion that the banker should inform both the trustee and the Board of Trade of after-acquired property, is not that putting rather a heavy burden on the banker for a very little advantage? - Surely if he informs either of them it is good enough, is it not? - Well, will the Board of Trade always inform the trustee?
2659. I should have thought that was always done. If there is a private trustee in the saddle, the Board of Trade is not directly interested in the matter and presumably just passes the information on. - Provided it does not get lost in the workshop.

2660. Do you want to press for notice to be given to both of them? - I do not press it to both of them, except that I point out that it would be a convenience if the banker knows who the trustee is and that the customer is an undischarged bankrupt. I would like to see the banker under an obligation to inform the trustee as well as the Board of Trade.
2661. If he knows? - If he knows. If he does not know, then he could only inform the Board of Trade.
2662. I see what you say about the shares in private companies, and I think you would agree it would be fairly intolerable for the other shareholders of a family company if a trustee had the absolute right to force his own company into their board meeting, and that sort of thing. - Well, at the moment the provision is fairly intolerable the other way - the trustee can do nothing.
2663. Unless we give him the rights of a shareholder, subject to any provision that the company's Articles may contain as to offering shares to other members. - We suggest that.
2664. I have drafted something on this. It is rather long-winded: it is an extension of Section 48, subsection (3). May I read it to you and you can see what you think? "... and without prejudice to any lien on such shares, conferred on the company by its Articles or to any provision in such Articles requiring the shares of a bankrupt shareholder to be offered in the first instance to the remaining shareholders, the trustee shall, on his application, be registered as a member and may exercise all rights formerly exercisable by the bankrupt, notwithstanding any provision to the contrary in the company's Articles, provided nothing shall affect the status of the company". - I think that covers it. - (Mr. King): Yes, I think that meets the point precisely. I do not quite know how it would work out as regards the transfer of shares of a bankrupt member to other members. Of course, that would depend on the particular Article in each company. It might be very prejudicial to the rights of a trustee in bankruptcy.
2665. Mr. Emerson: But the bankrupt, before he became a bankrupt, subscribed to those shares knowing what the Article contained. - (Mr. Pearlman): But in the companies which are a family concern, where the whole object is to defeat the plans of a trustee in bankruptcy - in those companies the Articles might be drawn for that very purpose.
2666. Mr. Lloyd Williams: Then surely the trustee should not be in a better position than the bankrupt? - No, he would be in a worse position because if there was a special Article giving the other shareholders the right to acquire the bankrupt shareholder's shares at a particular price, it might be a very low price indeed, in order to defeat the rights of the trustee in bankruptcy.
2667. Mr. Beer: Has anybody any experience of such an Article being drafted? - (Mr. King): No, but if this clause were enacted, I can quite see that you would get this type of Article. - (Mr. Pearlman): Would you go so far as to try to extend it, to make it illegal for Articles of Association to contain a contracting-out clause?
2668. Chairman: I am afraid that would mean reforming the Companies Act, would it not? - You do not think you could go further than "notwithstanding any provision in the Articles to the contrary" which you have inserted at the end? Could that be extended to be not only "notwithstanding any provision in the Articles to the contrary" but "notwithstanding any provision in the Articles that the shares should be acquired by the remaining shareholders at a value which did not represent the real value"?
2669. I think we might do something of that sort. Your next point is where the trustee is selling property he ought not to be put to prove the receiving order, because there could not be an adjudication order without a receiving order. - That is so. The point of it is only to facilitate conveyancing practice, rather than to alter the law.

2670. Well, a new subsection to Section 53 might meet the case, do you think? What I jotted down was simply: "On a sale by a trustee of land forming part of the property of the bankrupt, no proof of the making of the receiving order shall be called for by the purchaser". - That would be adequate, yes.
2671. It does seem quite silly to force the trustee to do that. As I see it, there could not be any adjudication order without a receiving order. - There could not be.
2672. As regards your views on powers exercisable by the trustee, what, in effect, you want to do, as I understand it, is to make the Board of Trade a sort of court of appeal from the committee of inspection? - If necessary, the trustee can go to the Board of Trade immediately if the committee of inspection either are obstinate or cannot be got together conveniently quickly.
2673. Would not your suggestion be rather an encouragement to slackness on the part of the committee men? - It is very difficult now, I believe, for trustees to get committees together.
2674. It is very difficult indeed. - And whilst on this point, I would like to mention another matter if I may - it has been held to be improper for a trustee to act on a postal vote.
2675. We thought of providing for a postal vote. - Well, a postal vote could be made permissible. That would relieve the trustees considerably.
2676. I think it would. I said a postal vote: the suggestion was that it must be unanimous. - Yes, I would not object to that.
2677. We were proposing to enlarge the power of a trustee to employ a solicitor. I do not know if you would like to enlarge on what you say about the trustee being able to employ a solicitor. - It is tied up with paragraph 34, if we might deal with them together. We place considerable importance on our submissions in paragraph 34.
2678. I think we have really met that. As things stand at the moment we were going to require the taxing master to be satisfied either of the prior sanction for the employment of the solicitor or sanction within three months thereafter. We also thought, subject to your reactions, of doing away with all taxation except of solicitors' bills, and providing there should be no need to tax a bill of less than £21 in any one bankruptcy or to tax any cases covered by Schedule I of the Solicitors Act. - That would partly cover it.
2679. It would go some way to meet it? - It would go part of the way, but first we feel that, provided the trustee is authorised at some time to retain a solicitor, it is wholly immaterial as to when a solicitor is retained because unless he gets the retainer he cannot be paid.
2680. Quite. - And as it stands at the moment, it is a technicality which imposes considerable hardship upon the profession.
2681. It does not matter about the date of the retainer; whether it is before or after the time? - That is what we are after. We are not suggesting that the retainer should be abolished.
2682. No, but that the actual time when it comes about should be immaterial? - It should be immaterial as to when the retainer or sanction is obtained, provided that it is obtained any time before the bill is taxed. If I may add, on the same point - we have not included this in our memorandum but we have discussed it among ourselves - we do feel that consideration might be given to authorising the Official Receiver, when acting as trustee, to agree a solicitor's bill of costs, instead of having it taxed.

2683. Would you confine it to the Official Receiver? - I do not know what my colleagues would say, but for myself I would be content to limit it to the Official Receiver, because not only has the Official Receiver got the Solicitor of the Board of Trade behind him at all times, but the Solicitor to the Board of Trade does second to the Official Receiver a solicitor member of his staff who is capable of advising him on any point upon which he requires advice. It would save a great deal of trouble, particularly in a Schedule I taxation, that is to say, a scale bill. There should really be no need for taxation of any bill if the Official Receiver or the Board of Trade agrees.

2684. Of course, the latter part of your observations as regards taxation relate to Rules, and we could not help you very much over that though we might put a recommendation in the body of our Report. - Yes, we appreciate that, but as at the moment we are bound by the Rules and subject to certain hardships which they impose on the profession, we thought it proper to direct attention to them.

2685. May we now hark back to what you say about the qualifications of Official Receivers? - As regards the qualification of Official Receivers, harking back 25 years, my recollection is that practically every Official Receiver up and down the country was a solicitor. Now we have the position that we can count on our hands the number of Official Receivers who are members of the profession.

2686. There is no reason why a member of the Bar should not be a perfectly good Official Receiver? - None at all. At the moment, however, the majority of Official Receivers have no qualifications. Some are accountants: others have no qualification except for having been educated for many years in the Department.

2687. That is not a bad qualification? - No, that is not a bad qualification, but we feel that it would enhance the status of an Official Receiver if he was amenable to professional jurisdiction as well as to his employer.

2688. But he is a civil servant. - He is a civil servant, but we suggest that he be either a solicitor or a barrister.

2689. Or a chartered accountant? - Or an accountant with certain recognised qualifications, to be prescribed, from certain institutions.

2690. Mr. Beer: This is purely on the grounds of status? - Purely on the grounds of status.

2691. Do you regard it as important then that the Official Receiver should possess the general legal qualifications of a solicitor? - I think it is important that an Official Receiver should possess the general legal qualifications of a solicitor because he is all the time administering the law of bankruptcy, and not only is it the law of bankruptcy with which he is concerned but, to a great extent, also the general law of contract.

2692. But the suggestion is that 50 per cent of the Official Receivers should be accountants, who have no such knowledge. - Except that accountants do have to undergo examinations and pass them in certain branches of the law which, whilst not as wide as those we have to pass, we would not like to think debarred them from occupying the office.

2693. Well, it seems to me that there must be a great difference in their general background - that the two things are inconsistent. - With respect, I think - or we think - that the two things are interwoven; a partial legal experience and a partial accountancy experience is invaluable in the hands of any Official Receiver.

2694. Have you any evidence that the Official Receivers without either legal or accountancy qualifications are less efficient than the trained civil servant? - I would not like to say that, but I think they do refer for legal advice to a greater extent than would otherwise be required.

2695. But the legal advice is there in the Board of Trade, day by day and hour by hour. - That is so. I agree there.
2696. Chairman: Of course, it is very desirable that he should have some capacity as an advocate if he has got to take public examinations. - He must have that capacity.
2697. Mr. Lloyd Williams: But it does not necessarily follow that a solicitor is an advocate? - Definitely not, no.
2698. Chairman: I should say that advocates are born rather than made. However, I do not imagine that the Board of Trade would like the idea of statutory restrictions on the qualifications of an Official Receiver. - (Mr. Heap): I suppose not. I think we must leave this thought with the Committee now. We have put it to you.
2699. You say, with regard to surplus funds, that you think it would be a good idea to give power to the trustee to take up "rights" issues, whether they are issued for nothing or whether they are required to pay something for the shares? - We do.
2700. You refer to Section 90. I think it should be Section 56, should it not? - (Mr. Pearlman): Section 90 deals with the investment of surplus funds.
2701. But that is a different thing from the trustee taking up "rights". - Yes, Section 56 might be a more convenient place in which to confer the power, if you decided to recommend it. Our purpose in putting forward this recommendation is because "rights" issues are of comparatively recent origin and have increased in their frequency compared to what they were before the war.
2702. Yes, they seem to be getting more used: they seem to be getting more frequent than they were. - I think the majority of new issues today are "rights" issues.
2703. Given that the companies got the necessary leave to issue the "rights", there is no reason why the trustee to the bankrupt's estate should not have the power, subject to proper safeguards, to take them up? - It might well be an asset. That is what we have in mind, because he has no power to do it today.
2704. I see you want to give the Board of Trade power to remove a trustee on reasonable suspicion. - Yes.
2705. That is rather going back to the days of the Inquisition? - I am conscious of that, but I do think it is necessary, and I feel that in the light of experience - in which I may refer to Mr. Waterer - the power to remove a trustee should be somewhat wider than it is. I have in mind the case which I mentioned at an earlier session of the trustee who is now a bankrupt, where the man was eventually removed; but it did take some time before he could be removed.
2706. But the removal of the trustee is a very serious matter, and one has to have a very certain case before the Board of Trade would undertake to remove him, as I understand the position - never on suspicion. You would want more than suspicion. I think that is dangerous. - Well, I cannot press that further, beyond mentioning the name I mentioned on, I think, the occasion of the first session.
2707. Mr. Lloyd Williams: But one swallow does not make a Spring. - (Chairman): Or even a summer. - No.
2708. As regards Section 98, speaking for myself, I am in agreement with you, that the words "does not know" should be substituted for the words "is unable to ascertain". - Yes.

2709. And you would be in favour of adding the words "or place of business" in relation to the local County Court, would you? - We would. If you do not know the man's residence, even if you know where he is carrying on business, the proper place is the High Court.

2710. Which, as you say, is absurd. - It is absurd, yes.

2711. Does any trouble arise in practice through the Inland Revenue having the privilege of presenting the petition in the High Court? - We do not press that. It is automatically transferred to the County Court on the next occasion, but we direct attention to it. We envisage that the Inland Revenue would raise serious objections to presenting the petition through their Solicitor in London.

2712. About the transfer of proceedings - we were proposing to amend what is now Section 100, subsection (2), by adding after "in proceedings in bankruptcy" the words "or any part thereof", so that any motion in a bankruptcy could be transferred without the whole bankruptcy being transferred. - (Mr. Haap:) Yes.

2713. That would more than cover your point about the £500, would it not? - (Mr. Pearlman): In part, but it would involve the commencing of the motion at, say, the County Court in Cumberland - or Appleby, for the sake of argument - and then an application to transfer from Appleby County Court to London.

2714. Yes, but does that alarm you? It seems to me to be rather desirable in the proper case. - I should prefer, in a proper case, to be able to launch the motion originally in London in this manner, by making one's normal application for a date to be fixed for the hearing of the motion to the local Registrar of the County Court, and asking that, under statutory power, it be heard in London. He could then grant that application, and the papers would automatically go to London, and it would be entered in London.

2715. In the High Court? - In the High Court.

2716. Mr. Lloyd Williams: But surely it might be a particular matter where all the relevant evidence is in Appleby. Why should the witnesses be put to the expense of going all the way from Appleby to London? - I would not suggest that, but, if you will recall, the majority of motions in bankruptcy are heard on affidavit evidence, and they are argued mainly on the evidence filed by Counsel, and it is of course desirable to have those experienced in bankruptcy matters to conduct these motions.

2717. But an experienced Counsel could go down to Appleby? - He could, but the cost of doing so might be prohibitive.

2718. It might be less than the cost of bringing all the witnesses and the relevant parties to London. - (Chairman): It would all depend on the particular motion, and how many witnesses required to be cross-examined and that sort of thing. - That is so.

2719. I should have thought that it would be right for a County Court Registrar to transfer a motion from Appleby to London without hearing what the respondents had to say about the transfer. - You have met us to a great extent on this point and we do not press the matter. But may I hark back on this point about paragraph 34, which deals with the allowance and taxation of costs?

2720. Yes. - It arises out of our discussion on paragraph 38, on bankruptcy motions being heard in some distant part of the country. Now on taxation of costs, the costs must be taxed, and there is a practical difficulty of agreeing the fee which is to be marked upon Counsel's brief. Now, if I have to send Counsel to Hereford, or some distant place, far from London, Counsel will require a fee of thirty-five guineas to be out of London, if he is a man experienced in bankruptcy

matters. At the moment we can mark that but, from a practical point of view, we cannot pay him that fee until it has been allowed on taxation, and we are occasionally asked by Counsel's clerk, "How do we know we will be able to get the fee which you are marking us? Will you personally guarantee the payment?" Counsel, on the other hand, will not accept a brief marked "X guineas or such other sum as may be allowed on taxation".

2721. No indeed. - And if I may suggest it here, it might be convenient, under paragraph 34, to allow the committee of inspection to approve the fee to be paid to Counsel for attending on a particular matter, to avoid this invidious position arising.

2722. The powers of the committee of inspection, are in Section 56, I think. - Yes. We do not ask anything about our own remuneration in this way, but that we may be able to tell Counsel what he will be paid, because he does not know what he will be paid, and the amount he will receive may be like the Lord Chancellor's foot.

2723. Mr. Lloyd Williams: You are limiting that to Counsel's fee and in cases where he has to travel some considerable distance from London? - That is so, because at the moment the Counsel practising in bankruptcy are pretty well exclusively in London - the Counsel who claim to be experts upon the subject.

2724. They come to see me sometimes and I am not in London. - But you are very near. - (Mr. King): I should rather like to extend that to any fee to Counsel, whether it is for going to some place in the wilds or whether it is for getting a special opinion of Counsel. You never know what fee he is going to charge, and if the committee can agree a fee beforehand and tell Counsel his fee, that would be a good arrangement.

2725. Chairman: Do you not think there might be a practical difficulty in deciding where civilisation ends and the wilds begin - "wilds" in the sense of remote, of course? If we are going to do it at all, my feeling is that we ought to do it for all Counsels' fees. - (Mr. Heap): Yes, it is a matter of principle.

2726. That would have to be borne in mind. - (Mr. Pearlman): As an alternative, may I suggest that there should be power to go to the Registrar who will ultimately have to tax the bill, or to the Court, to obtain his approval of the fee in question, so that all parties know where they stand?

2727. That, I think, would be a much better idea. - Yes. I have had that - not in bankruptcy but in companies - when I have wanted to incur a special expense and the Registrar says, "I cannot deal with this until you bring your bill in for taxation"; and all he has been able to do is to say, "Well, if this comes before me, whilst I do not bind myself, I shall not object to it". That is not very satisfactory.

2728. Under Section 102, I see you want the Registrar in a County Court to hear the discharge subject to the right of the bankrupt, if he wishes, to be heard by the Judge. - Yes. We think there might be a considerable saving of time. The Registrar has heard the public examination and knows the demeanour of the debtor, and that sort of thing. On a discharge, the debtor very rarely gives evidence to dispute the Official Receiver's statement.

2729. Very rarely. - And it would be convenient for the same person who took the public examination to also take the discharge.

2730. We were proposing to assimilate the County Court's jurisdiction with that of the High Court Registrar's, by providing that under Section 102(2)(c) the Registrar should have power - this is both in the County Court and in the High Court - to grant orders of discharge, to enter caveats against a bankrupt's discharge, and to grant certificates of removal of disqualifications. If we adopt your proposal it would be necessary to add something like this: "Provided that an application for

a bankrupt's discharge shall, if the bankrupt so desires and so states in his application, be heard by the judge"? - Yes.

2731. Do you not think that the effect of that might be that every dishonest debtor inevitably would go for the Judge who had not heard his public examination and knows nothing about him, rather than the Registrar who knows him for the rogue he is? - If that position arose, then surely the Judge would undoubtedly have read the whole of the public examination thoroughly, knowing that he has got a difficult matter to deal with.

2732. Under Section 102(5), any specified Registrar has all the powers of the Registrar in the High Court. That is a general provision. We were proposing to abolish that and assimilate the two things. - We would not have any objection to the assimilation. - (Mr. Heap): May I mention, just for the record, that in the last line of paragraph 39(a) there is a mistake. The word "for" should be "from".

2733. Yes, clearly it is a misprint. He has the right now, has he not? It is expressly provided for an order for discharge to be appealable - to appeal without leave to appeal. What do you mean by the absolute right of appeal - without leave? - From an order refusing a discharge or granting a discharge on conditions.

2734. But that exists now, does it not? It would not be necessary to alter the Act? - We thought it did not exist: maybe we are wrong.

2735. But in any case, whether he has or has not at the moment, you think he should? - We do.

2736. I see you want to give the Registrar in the County Court the power to commit. - (Mr. Pearlman): Yes.

2737. That is rather drastic, is it not? - Well, if the Registrar is conducting a public examination, for the sake of argument, and the debtor is recalcitrant, with the present procedure he is reported to the Judge, and the Judge commits him if he still refuses to answer. But is there any reason why the Registrar should not exercise that jurisdiction?

2738. Well, it is rather contrary to principle that he should, because it is a matter affecting the liberty of the subject. I see that you want to get rid of the Divisional Court in bankruptcy? - It seems an anomaly.

2739. It is an anomaly. Actually, I have personally consulted the Master of the Rolls, who has consulted his colleagues about it, and they are against abolishing it. They think it is a useful anomaly. I do not know whether, in view of that, you want to press for its abolition? - I am reminded by Mr. King that if, as a result of your deliberations, you recommend - and it becomes law - that motions in bankruptcy in a County Court bankruptcy should from time to time be heard in the High Court, it would be very anomalous if an appeal from such an order on a motion by a single Judge should be heard by two Judges of the same Division.

2740. I fancy that if a motion was transferred to the High Court and decided by them, the appeal would go to the Court of Appeal. - If that were provided for.

2741. I think we shall have to see that our draft provisions contain it, or recommend that a rule be made to that effect. It would be anomalous to go from one High Court Judge to two High Court Judges. The next thing you want as regards appeal is that you want an appeal to the House of Lords in a County Court bankruptcy. - Well, we put it this way: there should be an appeal to the House of Lords in any bankruptcy from the Court of Appeal, upon the same conditions and in the same manner in which the Court of Appeal now gives leave to appeal from a judgement in any ordinary action, with the leave of the Court of Appeal or of the House of Lords.

2742. We thought of empowering the House of Lords to give leave for appeals to itself in cases where there is a right of appeal with leave at the moment. - At the moment it is only with special leave of the Court of Appeal, I think.
2743. Yes. - And then not in County Court bankruptcies at all. We would recommend extending the right of appeal even to County Court bankruptcies.
2744. Do you not think that too many rights of appeal are a curse rather than a blessing? - I agree they are a curse rather than a blessing, but on the other hand, with the County Court having the same jurisdiction as the High Court, matters of very great importance which ought to be determined by the House of Lords cannot be determined by it today.
2745. Is your proposal of a right of appeal to the House of Lords in County Court bankruptcies interlinked with your proposal to abolish the Divisional Court? - Yes.
2746. So in fact there would only be the same number of appeals in each case? - That is so. - (Mr. Heap): I think events have overtaken us in paragraph 40(C). I think there is a new Rule of the Supreme Court which does require grounds to be stated, in which case the anomaly has gone.
2747. In any event, it would be much better to have grounds stated in both cases, rather than to have occasions on which grounds need not be stated. - Yes, we have the Rules here; that point has gone.
2748. I thought that had happened. - (Mr. King): Rules of the Supreme Court, Appeals, 1955. - (Mr. Heap): Order 58, Rule 3, sub-rule (2).
2749. As regards your proposed amendments to Section 130, it would meet your point if the words "shall if" were substituted for "may when" in subsection (3), would it not? At present it reads "after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, but that court may, when satisfied that the estate is insufficient to pay its debts, transfer the proceedings". If you substituted "shall if" that would meet your point, and make it compulsory to transfer the estate if it was shown to be insolvent? - I think that meets the point.
2750. I suppose you would want to retain your other recommendation if that were done? - (Mr. Pearlman): Paragraph 41 (B)?
2751. Paragraph (B) - I fancy that would still stand? - Yes, that stands.
2752. As regards the last paragraph of your memorandum, what we are proposing to recommend is first of all the repeal of the dreadful Section 4 of the 1926 Act and secondly to substitute the gazetting of the receiving order for the making of the receiving order for the purpose of protected payments. I do not know if you approve of that scheme? Section 4 of the 1926 Act is an awful muddle, as you remember. The subrogation point I do not think could arise if Section 4 were repealed and gazetting substituted for making. - (Mr. Heap): We thought it not the first half of our suggestion but not the last half, but maybe if the first half is met in the manner you indicate the second portion would not arise.
2753. That is what I think; being protected, there would be no need to ask for subrogation. - (Mr. Pearlman): Would it not be as well to provide for the case where the banker might have express notice of the making of the receiving order or of the presentation of the petition?
2754. I think we were going to provide that, before the receiving order is gazetted and without notice thereof. As you say, a petitioning creditor's solicitor, if he were a very prudent man, might think it right to write to the banker and tell him a receiving order has been made,

although it has not as yet been gazetted. - Or give notice of the presentation of the petition.

2755. Yes, that is what I thought. The words we were going to suggest were - "without notice of the receiving order and before the receiving order is gazetted". - May I suggest - "without notice of the presentation of a petition"?

2756. I do not think so. - Because when the bank receives notice of the presentation of a petition it then freezes the account, and there must be a petition before there is a receiving order.

2757. The bank freezes the account if it has notice of a petition anyway as things stand at the moment? - Yes.

2758. That gives us considerable food for thought. - If I might help you a little more, the law as I understand it today is that if a petition is presented against an individual and you give notice to the bank of the presentation of the petition, the bank will not part with any sum of money at all, and the account is automatically frozen. Now, if a man has a petition against him, provided a receiving order is made, it would not be, in my submission, very well to put the bank in a better position hereafter than they are now, and I was thinking that the suggested wording you read out for the amendment to this Section might have an effect of altering the law so as to enable a bank to ignore notice of a petition which it had received.

2759. For safety we could do both, could we not, and provide that the payment etc. takes place without notice of the petition or the receiving order and before the receiving order is gazetted? - That would cover my point.

2760. If you do not mind, we were going to show you a copy of a draft which Mr. Waterer has made of a new subsection (6) to Section 107. This is in regard to your point about the freezing order. This is following very closely on the existing wording of subsection (4). - (Mr. Heap): Though the Solicitors Act refers to the application being made to the High Court or a Judge thereof, it is in practice usually made to a Master.

2761. I think I am right in saying that under the Rules of the Supreme Court the phrase "the court or a judge" means a Master in the first instance, does it not? - (Mr. Pearlman): Yes, you are right. - (Mr. Heap): Then it would follow from that that if this were enacted the Master would have the responsibility of making the receiving order.

2762. He could always adjourn the matter to the Judge either off his own bat or on application, could he not? - That is true. - (Mr. Pearlman): What troubles me is this: that a Master of the Chancery Division has no experience in bankruptcy matters, and has no experience of the principles upon which Registrars of the High Court or of the County Court exercise the discretion conferred upon them by subsection (4) in deciding whether or no a receiving order will be made. I am speaking personally here, and I do not know to what extent my colleagues are in agreement with this view, that it might be an invidious position if a Master were to exercise the jurisdiction to make a receiving order without experience of this branch of the law, and that if a receiving order is to be made it ought to be made by the High Court in bankruptcy rather than by a Master who has probably never seen a receiving order or who has never had to adjudicate on such a matter.

2763. We could meet that by a second proviso - "Provided also that the powers conferred by this subsection shall not be exercised by a Master". - Yes, that is the very proviso we were considering at this end of the table.

2764. What I think we really wanted you Gentlemen to tell us was whether you like this in principle, as an improvement on the original idea of having your own private act of bankruptcy and a fictitious £50 debt? -

(Mr. Beap): I think the answer to that is that in principle we do like it. We do not want to delay you; could we take these away with us and have some thought and perhaps write you a letter?

2765. Yes, certainly. - If we have any further thoughts we think might be of help we will write you a letter.

2766. I have nothing else I wanted to ask you, Gentlemen. If you are going to think over our draft we would like to think over your draft amendment to Section 1(1)(g), for which we thank you. Thank you very much for the help you have given us. - I would like, on behalf of my colleagues and myself, to thank the Department and the Committee for the very courteous way in which we have been received.

(The witnesses withdrew)

Monday, 3rd December, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
MR. G.E.M. EMMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.E. PEIRCE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.E.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

LETTER RECEIVED FROM
BUILDERS SUPPLIERS CREDIT ASSOCIATION LTD.

High Holborn House,
52-54, High Holborn,
London, W.C.1.

5th July, 1956.

B. MacTavish, Esq.,
Board of Trade.

Dear Mr. MacTavish,

BANKRUPTCY LAW AMENDMENT COMMITTEE

In reference to your letter of 8th May, I now have pleasure in giving comments from the Association on the notes and questions which you sent with your letter.

ITEM 3 (1):

Arising from comments received from the Association's professional advisers, it is considered that the suggestions in the Appendix are constructive and desirable, subject to the following comments:-

Appendix (a) It is considered that the suggested period of two years is desirable.

(b) The Trustee should have the power to apply for a caveat as well as the Official Receiver or any creditor, or on the initiative of the Court.

The last sentence might be amended to read "In that event the Bankrupt would have the right to apply to the Court for his discharge in accordance with present procedure and the Court should be at liberty to grant the discharge at the expiry of two years of the conclusion of the Public Examination or make such longer suspension as it thinks fit."

(c) It is considered that this should be widened to cover all Bankrupts during the suggested period of two years from conclusion of the Public Examination and all Bankrupts against whom a caveat is entered until the date of their discharge should abide by the suggested requirements.

(d) Agreed.

(c) Agreed, provided that the date of automatic discharge is at least two years from the date of conclusion of their Public Examination.

Two members of our Board of Directors state, however, that they are not in favour of automatic discharge after two years. One comments that if a time is to be given it should be a minimum of five years so as to avoid too early a complete re-entry into the general business community. The other director points out that an automatic discharge would appear to withdraw the review at present necessary, and might possibly, in some cases, encourage a "go slow" policy during the fixed period. As the entering of a "caveat" is made at the conclusion of the Public Examination, it would not be possible to determine whether it was necessary to do so and the result would tend to be the entry of "caveats" in every case, with a resulting additional burden on those concerned.

ITEM 3 (2):

One of our directors takes the view that it would be inequitable to apply assets acquired after bankruptcy to creditors in a subsequent bankruptcy in priority to debts outstanding on the prior bankruptcy, because the bankrupt must give notice that he is undischarged so that the person then dealing with him does so at his own risk. Our professional advisers, on the other hand, consider that the suggestion is equitable and desirable.

ITEM 3 (3):

It is considered that the petitioning creditor's debt should remain at £50. The estimated value of assets for an order for Summary Administration might be increased to £750 and thus place a limit on the number of cases which would reach the Official Receiver's hands. We would, however, comment that any such adjustment should not have the effect or lead to the increasing of the £10 limit under Section 155 of the Bankruptcy Act, 1914.

ITEM 3 (4):

It is not considered that any alteration of the existing law is required.

ITEM 3 (5):

It is considered that the possibility of creditors appointing the Official Receiver in non-summary cases would be an advantage in so far as it should limit costs. Our professional advisers take a somewhat different view that there should be no alteration of the existing law except to increase the limit of assets to £750 (as given in ITEM 3 (3) above) which would also have the effect of limiting costs in small cases.

ITEM 3 (6):

It is not considered that any alteration of the existing law is required. In such cases the bankrupt can apply for a rescission of the Receiving Order if he is not prepared to await his automatic discharge.

ITEM 3 (7):

Agreed as desirable.

ITEM 3 (8):

It is considered that such an amendment is desirable if it would have the effect of making prosecutions more practicable. Our professional advisers comment that Section 161 requires amendment and suggest that a simplified procedure, similar to that provided by the Companies Act, 1948 under Sections 334 (2) and (3), should be adopted.

It is not considered that any alteration to the existing law as to control by the Board of Trade is required.

Our professional advisers have also put forward the following detailed comments regarding the Deeds of Arrangement Act:-

It is suggested that the following matters may receive consideration in connection with the amendment of the Deeds of Arrangement Act and/or Rules:

1. It should be made clear in connection with the Affidavit required to be made by debtors under the Deeds of Arrangement Rules 1925 as to their property that failure to make a full disclosure renders the Debtor liable to the provisions of the Perjury Act, 1911.
2. That the present Form of Debtors Affidavit should be extended to include as a further schedule a statement setting out particulars of the Debtor's assets.

At present the form of "Debtor's Affidavit" merely discloses the total estimated amount of property without any details, and a Trustee therefore has very little control over dishonest debtors who may omit particulars of their assets.

3. A Deed of Assignment made for the benefit of Creditors should be of all a debtor's property and assets, excluding only that which would not pass to a Trustee under the Law of Bankruptcy, unless there was special disclosure to Creditors of any assets omitted at the time the Creditors are asked to assent to the Deed.

4. The disposition of Assets between Creditors should be with like priorities and in all respects as in bankruptcy. It is considered that any departure from this as now allowed by Section 17, should be specifically stated at the time Creditors are invited to assent.

5. As an alternative to Suggestions 3 and 4 above, it is suggested that a Statutory Form of Deed of Assignment might be included in the Deeds of Arrangement Act, and any departure from such statutory form should be specifically notified to Creditors before they are invited to assent.

If it is considered by the Committee to be desirable for a statutory form to be incorporated in the Act, further suggestions as to points which may be covered in such statutory form can be made.

6. The period in which a non-assenting creditor can petition for bankruptcy relying on the execution of the Deed as an act of Bankruptcy should be reduced from three months to 21 days after registration. Such a period will then be in keeping with the period given to Creditors to assent to the Deed.

It is not considered that the present provisions of Section 24 are sufficient to give protection to Trustees.

7. If the law is not amended, as suggested in 6 above, the acts and dealings of a Trustee under a Deed subsequently voided should be made valid if carried out bona fide and for value and with the knowledge and consent of the Creditors or of a constituted Committee of Creditors appointed by any Meeting of Creditors. The Trustee should be entitled to be paid his proper charges and out of pocket expenses of and in connection with the Deed out of any assets realised by him, with the right to apply to the Court.

It is suggested in general that the position of a Deed Trustee in a bankruptcy ensuing before the Deed matures should be similar to that of a voluntary liquidator where a compulsory liquidation subsequently ensues.

8. In lieu of Section 23, the Act should give to a Deed Trustee power to apply to the Court for directions similar to Section 79 (3) of the Bankruptcy Act, 1914.

9. That a Deed Trustee should have the same rights of examination before the Court as are available to a Trustee in Bankruptcy under Section 25 of the Bankruptcy Act, 1914.

10. That the registration of a Deed of Assignment should be advertised in the London Gazette, and a Certificate of such advertisement should be lodged by the Trustee with the Registrar within 28 days of the registration of the Deed.

ITEM 4

On general legislation, the style and formalities regarding Proofs of Debt and Proxies need simplification and as regards one detail in particular, a Director or Secretary signing a Proof of Debt on behalf of a Limited Company should automatically be allowed to represent the Company at a Meeting, without the necessity of lodging a formal Proxy.

In addition our professional advisers make the following comments:-

Bankruptcy Act

It is suggested that Section 155 of the Bankruptcy Act 1914 be amended to make it incumbent upon an undischarged Bankrupt to make a disclosure in writing of his position.

Preferential Claims - Section 33 Bankruptcy Act 1914

It is suggested that an unduly large proportion of assets are paid away in preferential claims, and accordingly that the limits on various classes of preferential claims should be reduced. In particular:

Rates - At present up to 12 months arrears of Rates rank in priority to unsecured creditors.

Rates are due when made, and if Local Authorities neglect to collect, it is difficult to understand why they should obtain prior rights.

Assessed Taxes - It is suggested that the existing provisions should be so framed as to prevent the Revenue in effect claiming two preferential years as for example one year in relation to Income Tax and a different year for Surtax.

P.A.Y.E. - It is suggested that preferential arrears should be limited to four weeks. P.A.Y.E. is payable monthly to the Inland Revenue, and if they fail to collect it is difficult to understand why they should obtain prior rights to the detriment of unsecured creditors.

It is hoped that these comments and suggestions will be of assistance to the work of your Committee.

Yours faithfully,

(Sgd.) F. BARDY.

Secretary.

Mr. Richard Langdon Davis, F.C.A. }
 Mr. Frank Hardy } Representing Builders Suppliers
 Credit Association Ltd.

In Attendance: Mr. R.L. Crowther (Building Industry Distributors)

Called and examined

2767. Chairman: Thank you for your memorandum. I do not know if you have seen an up-to-date version of our proposals as regards discharge, which is reference number BIA/112. I think you have had that? -

(Mr. Hardy): Yes, we have had that.

2768. You did not have it, I think, at the time you prepared your memorandum. We are all glad to see that you agree with us about the period of two years. You do not think that is too short? -

(Mr. Langdon Davis): The Association have in their memorandum under item No. 3 (1) at the foot of page 1 stated that a number of their Directors consider that two years is too short a period, and they suggest five years.

2769. Yes, but I gather the majority view is in favour of two years? - Not a majority view of the Board of Directors. So far as the professional advisers are concerned, they rather felt that the suggested period of two years as a minimum was an advance over the position which has been obtaining since the 1926 Act. As you know under the 1926 Act the question of suspension and the time of suspension were made discretionary in the Court as opposed to the two years minimum obtaining under the 1914 Act, and it has been the practice, particularly in the High Court, for suspensions to be in the view of some members of the profession rather nominal. Suspensions of three months and six months have not been at all unusual, and the professional advisers of the Association therefore thought that it was an advantage to get to a minimum period of two years which virtually brought the position back to that which obtained under the 1914 Act. Admittedly under the proposals now there is not the protection that there was under the 1914 Act because the 1914 Act dealt with conduct which had to be taken into consideration on discharge, whereas the proposals now put forward make a discharge absolute at the end of two years, as I understand the position.

2770. That is not quite right. The bankrupt gets an automatic discharge at the end of two years if he makes no approach and if no application is made for a caveat, but there is no absolute minimum period of two years for which discharge must be suspended. He could apply within the two years for a discharge under the existing procedure. - Yes.

2771. A good many people have thought that the two years within which a caveat may be applied for is too short. Do you feel that? - The Board of Directors by a majority decision do feel that the two year period for automatic discharge is too short, and they think five years is a proper period.

2772. Mr. Peirce: I wonder whether the Board of Directors were apprised of what you have just said to Mr. Langdon Davis about the caveat. -
 (Chairman): The Board had before them, I suppose, the appendix to the original circular, did they? - Yes.

2773. And not the newer document, BIA/112? - Yes.

2774. Mr. Lloyd Williams: I wonder if I could simplify this. I rather think I see Mr. Davis's point. You consider two years as an automatic period is too short? - That is correct.

2775. If you take the figures of the average discharge - the average discharge - you will find, I think, probably it is very much less than two years? - Yes.

2776. What you are worried about is the question of conduct? If it is a question of conduct then of course a caveat is asked for and the automatic discharge does not apply. I do not think you have quite appreciated that? - I appreciate the point the Chairman has now elucidated. The point the Chairman raised was that two years was not necessarily the minimum period because, under the proposals a bankrupt can apply for his discharge under present procedure, and he can obtain it at a much shorter period if the Court so determines.

2777. I should not think if he is an innocent bankrupt ... - Experience has taught me there are very few innocent bankrupts.

2778. Then there would be a caveat and the two years does not apply. - There can only be a caveat if application is made, and suggestions have been put forward that the persons capable of putting forward an application for a caveat should be widened. In the original proposals the Official Receiver could apply. We have asked that this right should be extended to the trustee. We have asked also that it should be extended to any creditor who has proved his debt.

2779. Chairman: If I may interrupt you there for one moment, under our last proposal it is envisaged a creditor who has proved his debt can apply for a caveat at the conclusion of the public examination, but that we should confine to the Official Receiver or trustee the right to apply during the subsequent two years. You would like to see the creditor entitled to make an application at any time during the two years? - We should like to see an Official Receiver, trustee or a creditor able to apply at any period in the two years.

2780. Mr. Lloyd Williams: Could not a creditor let the Official Receiver or trustee know that he had grounds for applying? - He could, but I know of no procedure under which he could make them do so.

2781. He could always apply to use the Official Receiver's name on giving an indemnity? - I do not know.

2782. Chairman: It is so at present. If he is prepared to furnish an indemnity, the Court can order the Official Receiver to lend his name. - We then get the question of cost incurred by creditors who have already incurred a great deal of loss.

2783. Mr. Lloyd Williams: If a creditor has a good case for a caveat, he would not mind indemnifying the Official Receiver? - I think he would object to the Official Receiver as a Government official.

2784. A trustee then? - A trustee would be entitled to apply, but unless there are funds in the estate there is nobody to pay him.

2785. Do you not realise that your suggestion may mean frivolous applications at the expense of the estate? - That might be the case, but not at the expense of the estate if a creditor himself applies. The Official Receiver is a Government official and has to deal with such matters as may arise in the bankruptcy, and the trustee is not concerned with the direct application.

2786. But surely the creditor would have attended the public examination and then made application for a caveat? - He may not have proved his debt at the time of the public examination. In practice it very often takes place within quite a short time after the making of the receiving order.

2787. Chairman: Do you not think there is some danger that if we allowed creditors to make applications for a caveat during the two year period time and money might be wasted by some malicious creditor making repeated applications one after the other and, as soon as one is dismissed, making another? - That might arise but I think a protective clause could be put in that no second application could be made.

2788. Something would have to go in. - I think there should be protection.

2789. Mr. Emerson: What about the protection of a resolution of the whole committee of inspection, for example? - That might do.
2790. Chairman: I see you want to make the duty to inform the Official Receiver of changes of address and so on apply in all bankruptcies? - Yes, I consider that is a very advantageous protection.
2791. If you do that things are going to be just as hot for the sheep as for the goats? - I submit that there is no reason why a bankrupt should be relieved of the onus of keeping his trustee and the Official Receiver informed of his acts and dealings. It is part of the duty of the debtor which already obtains in his bankruptcy.
2792. Mr. Lloyd Williams: Supposing he does not? - I suggest he would be guilty of contempt of court.
2793. How is the Official Receiver going to find out if he does not notify a change of address? - The Official Receiver cannot find out, but the onus would remain on the bankrupt to give the data at certain definite periods. If he fails to do so then he is definitely guilty of a misdemeanour under any revised Act of Parliament, I suggest.
2794. The change of address, you are talking about? - Under the existing Act he has to keep the Official Receiver advised of his present address and any change of address.
2795. Chairman: Of course, if Official Receivers have to obtain from all bankrupts an account of their transactions in each case at a stated period, say every six months, it is going to impose an appalling burden on their staff, is it not? - I do not think so.
2796. Our idea was, you know, that this caveat procedure would form a sort of - I cannot help mixing my metaphors - a sort of sieve dividing the sheep from the goats, which would let the comparatively innocent bankrupt out automatically and hold the goats - the wicked bankrupts - up for a very long period. If you make the thing just as hot for the sheep as the goats, there is no advantage in being a sheep. - Yes, I see the point. I certainly am definitely of the opinion that it is not advantageous that the existing procedure should still obtain whereby bankrupts can obtain a discharge subject to a very short suspension.
2797. You did appreciate, did you not, at least I hope you did, what we were aiming at doing was achieving what two previous Committees on this subject have recommended, namely reducing the number of undischarged bankrupts in the country. We understand there are something like 40,000 loose in England at this very moment, of whom probably quite a small minority are real villains. - They are undischarged because they have failed to take advantage of the procedure to obtain their discharge. I cannot see why the community should be interested in whether they are undischarged bankrupts or not.
2798. I think there are several reasons why, one of which is that when eventually they die very distressing applications have to be made against their widows and families to get hold of all the property of which they died possessed. - Yes.
2799. Shall we pass to your question of the second bankruptcy unless you want to say any more about the discharge position? Since our memorandum was sent to you we have had another suggestion made to us which was that, instead of either the proposed new system or the existing system, the assets in the second bankruptcy should be applied in paying to the second lot of creditors a dividend equal to that already paid to the first lot of creditors, and thereafter should be shared equally between both lots of creditors. I do not know if I have made the scheme clear to you, but I should be interested to know whether you think that is better than the proposed scheme or the existing scheme, or whether you think it would not work. - I think there would be a lot of difficulties. My opinion is that the assets should be available for the second bankruptcy.

2800. In the first instance? - Yes. As set out in item 3 (2) of the memorandum, our Board of Directors are not wholly in agreement with that view.

2801. If we may go on to the question of money limits, I see you are, as most of us were, in favour of retaining the £50 for the petitioning creditor's debt? - Yes, that is so.

2802. As to the ceiling for summary administration you suggest £750. Would you quarrel with £1,000, or do you think that is much too high? - I think it is getting on the high side. There have been a number of figures put forward to the Directors of the Association varying from £500 to £600, and the professional advisers have suggested £750 as the upper limit. Here again it would probably be a very big strain on Official Receivers if they had to deal with a great increase in the number of small cases.

2803. On the other hand people who act professionally as trustees do not seem to like very much handling cases with less than four figures in them; there is little left on the bone for the trustee. - Yes, that certainly may obtain. I would not quarrel with £1,000.

2804. One monetary limit you do not deal with is the bedding, tools of trade and so on in Section 38. We thought of recommending that that figure should be abolished and the whole thing left to the discretion of the Official Receiver and trustee, bearing in mind that that which is excepted is limited by the word "necessary". - I would not agree with that suggestion. I think the limit needs raising to take account of the decrease in the value of money and I would suggest it be raised to £50.

2805. Suppose you get a married man with a large family who is a dentist. He needs a great deal more than £50 worth. He has to provide some sort of furniture for his family and some tools of trade to stop people's teeth. - The Act provides for essential furniture for his family, bed and bedding for himself, his wife and his family, and his tools of trade. If the matter is left entirely open I would suggest one will get the case of the dentist with dental equipment worth some thousands of pounds which would be allocated to him instead of being available for his creditors. I want it to remain at £50, not to be at the discretion of the trustee, which I foresee would lead to many applications in the Court unless the trustee's decision was paramount.

2806. Even £50 would go nowhere in the case of the dentist with a large family. - It would cover the bed and bedding for himself, his wife and his family, but it would not cover his tools of trade. In the case of the dentist he has valuable tools which should be made available for his creditors.

2807. Then he cannot earn money for them, unless possibly by taking employment with another dentist and using his tools? - He would have to take employment, and we then come to the overriding question, is it desirable for an undischarged bankrupt to carry on as a sole trader?

2808. I do not know about trading, but surely for him to be a professional man rather than employee would be an advantage to his creditors? - It would be if the trustee could obtain an order from the Court attaching his earnings.

2809. We are proposing to enlarge Section 51 and make it as wide as we possibly can. I think you would agree with that? - I certainly agree with that.

2810. If we enlarge Section 51 we must let him have his tools? - I say we should let him keep his clothes. What I would suggest is that he should not be entitled to keep valuable equipment which should be sold for the benefit of the creditors.

2811. If we enlarge Section 51 to cover his earnings, we must let him have the tools to earn. - I suggest Section 38 envisages, not the tools of a man carrying on business as a proprietor, but the tools of trade of people such as a plumber, who takes his tools about with him as an employee.

2812. You would include such a person as a carpenter who very often works for an employer with tools which are his own property? - Specialist workmen.

2813. Mr. Lloyd Williams: £50 would not go very far with those, would it? - It goes a reasonable way. The Section is reasonably interpreted in practice and one must remember the Act does not say replacement value. It is the second hand value of tools of trade and the man's bed and bedding sufficient for himself his wife and his family - not in any way a replacement cost.

2814. Mr. Beer: Would it not amount to this? A plumber and a carpenter would be able to get by and go on earning money, whereas a professional man like a dentist has got to do something else. One man can go on earning the money he earned previously, while the other man's whole standard of living has got to be changed. - I think it is a question of values. To leave this matter entirely open, firstly would place an undue onus on the trustee, and secondly might lead to very substantial articles of value being retained by a bankrupt to the detriment of his creditors, the creditors merely being entitled at some time, if the Court so ordered, to obtain an order out of nebulous earnings in the future. In turn the man might sell his dental or professional equipment and utilise those moneys for other purposes.

2815. Chairman: I am not sure if the reference in our circular to you about after-acquired property was not rather unfortunately expressed. What we would be glad of your opinion about is how to prevent trustees having white elephants and similar property indefeasibly vested in them without their knowledge. - I can see no objection to a trustee having such assets as the bankrupt has possessed vested in him, because when the trustee obtains his discharge those assets automatically go back to the Official Receiver. They are available for realisation at any time when they may become realisable.

2816. I think we are rather at cross purposes. Supposing the bankrupt goes out and somehow or other acquires a white elephant or something else that costs money to keep up, the trustee may not want it. It may be the last thing he wants and as the law stands at the moment apparently he is saddled with it the moment the bankrupt gets it. He may be under a duty to feed or repair it or whatever it may be. What we thought of providing was that such property should not vest in him indefeasibly unless and until he claims it - as was thought to be the case until a recent decision of the Court of Appeal. - I see considerable difficulty in enabling the trustee to obtain knowledge of it. - (Chairman): He can always require the bankrupt to attend on him and tell him about after-acquired property. We have now made it obligatory on the bankrupt to disclose after-acquired property.

2817. Mr. Emerson: You still would rather keep it that such property be vested in the trustee and he can only get rid of it by disclaimer - if indeed he can do that. - I can see that certain types of property might be an embarrassment.

2818. Chairman: Such as leaseholds? - They can be disclaimed.

2819. If they are after acquired property it is doubtful if they can. I think we ought to make it quite clear that they can. - One these days often finds a bankrupt possessed of slum property which is freehold, and trustees are in an extremely difficult position because they are really the only people to have demolition orders made against them, sanitary notices served on them and such things as that. That is where the trustee gets into difficulties.

2820. That is just the trouble. One of our Secretaries has bitter memories of being forced to fence in a big pit which had vested in him as trustee of an estate. - There is a difficulty in the Act there because there is no power of disclaimer.

2821. Exactly. - No power of disclaimer at all.

2822. While we are on the subject do you think it should be made clear that there is a power to disclaim freeholds? - I think that would be desirable.

2823. While on the subject of after-acquired property, we also thought of putting in a provision in Section 38 that if the trustee claimed after-acquired property and gets it, it should be subject to a first charge of payment for necessities. That is putting the butcher, the baker, etc. in the same position as the undertaker is in where the bankrupt has died and been buried. I think that is right, do not you? - I can see no reason why a butcher and a baker should have any prior right over a builder's merchant or any other creditor.

2824. It is only extending the decision in *Re Walter* concerning a man who died and expense had been incurred in burying him. If he does not die he has to be fed, and the only way he can feed himself is out of after-acquired property. It is limited to necessities, you see. - It would require a tight definition of necessities, I think.

2825. The meaning of the term "necessaries" is fairly well known as regards contracts made for infants and lunatics and that kind of person. There is no reason why it should have a different meaning in this connection. - No. In general I cannot see why any prior right should be given to certain classes of creditors.

2826. Mr. Lloyd Williams: In other words he is better off dead than alive? - Many people are that.

2827. Chairman: It depends whether it is advantageous to be buried or not. What it would mean if we adopt your view is not that it is better if you are bankrupt to be dead than alive, but if you happen to be a creditor of a bankrupt it is better that the bankrupt should be dead than that the bankrupt should be living, because in *Re Walter* decided that where the man died the trustee should pay not only the undertaker but all other necessities that have been incurred. - Yes.

2828. Would that not be rather contrary to public policy? It brings about a state of affairs in which it would pay the creditors to bury the bankrupt. When I say the creditors I mean in this connection the creditors for possible bankruptcy necessities - the butcher, the baker, the candlestick maker. You probably know the decision in *Re Walter*. Would you like to see that reversed in the Act? - I am not really conversant with the case.

2829. It was a case in which a man died and the Court said the trustee must pay out of after-acquired property not only funeral expenses but other expenses for necessities incurred since his bankruptcy. - I would like to see the decision reversed.

2830. As regards the Official Receiver serving in non-summary cases I might remind you that at the moment the Act requires the Board of Trade to appoint a fit person to be trustee of the property if the creditors do not appoint a fit person. In fact, if the creditors want the Official Receiver to be trustee, the Board of Trade winks its eye and allows the Official Receiver to carry on. We could achieve the desirable aim of letting the Official Receiver serve as trustee if the creditors want it by altering the word "shall" to "may", could we not, which would sanction the Board of Trade doing that which in fact it now does. That would meet the point? - That meets the point.

2831. As regards cases where the bankrupt pays 20s. in the pound, I do not think you have considered, have you, what will happen in bankruptcies which were in existence before the suggested new Act comes into operation, and in which he pays out the 20s. after the new Act comes into operation. - Surely the bankrupt can then apply, as he is now able to, for a rescission of the receiving order at any time.

2832. Yes. Do you think we ought to make some provision whereby any property left over would automatically re-vest in the bankrupt? - No, I do not.

2833. What is going to happen to it? - I think an application should be made as it is now made. I think it would be a very dangerous thing for property automatically to re-vest in a bankrupt on an automatic discharge.

2834. Are you not confusing discharge with annulment? You see we are talking about the case where he has paid 20s. in the pound - all the costs, all the statutory interest - there is nothing outstanding. - Then my contention is that he should do as now - he should apply to have a rescission of the receiving order.

2835. Do you consider that where 20s. in the pound is paid the Court should have a discretion to refuse to annul, or do you think annulment should be automatic? - I think annulment should be automatic, but there should be an application made.

2836. That may be, but you think that a bankrupt who finds himself in a position to pay 20s. in the pound should be certain that his bankruptcy will be annulled if he does so, and that he gets his annulment no matter how bad his conduct? - Yes, I think that is the case. I do not think that creditors are concerned with conduct if they have their debts paid in full, but I do feel there should be an application made which will necessitate the bankrupt stating that he has paid all his debts in full. I am rather worried about any undisclosed liabilities.

2837. Mr. Lloyd Williams: Surely he cannot get a rescission without a report from the Official Receiver? - No, the Official Receiver will make a report, but there may be undisclosed liabilities. - If the bankrupt has to apply he has to apply on affidavit stating that he has made a full disclosure and all his liabilities have been paid. If he obtains an automatic re-vesting of assets and he has failed to make a full disclosure, hereafter he can as an undischarged Bankrupt deal with his assets without any formalities at all.

2838. He is not an undischarged bankrupt - he is no longer a bankrupt at all. It is as if he had never been a bankrupt. - When the adjudication has been annulled. My own opinion is that he should have to apply for a rescission of the receiving order, and have the adjudication annulled and that it should not be automatic.

2839. You have already told me you would like to see Section 51 enlarged to embrace all earnings as far as possible? - Yes.

2840. As regards prosecutions you want Section 161 simplified. We were going to recommend that it should be simplified in a very drastic way by abolishing it altogether. A Section which requires the approval of the Court in bankruptcy before prosecution seems to be completely out of place. I expect you would like to see it out. - The Association have put forward certain suggestions on that and have suggested that the procedure should be similar to that which obtains in voluntary winding up. Section 334 (2) and (3) of the Companies Act, 1948 makes it a duty on a liquidator to call the attention of the Public Prosecutor to any criminal act, and it then says the Director of Public Prosecutions shall act in the matter. A very simple procedure.

2841. We might put in something of that kind. - And the suggestion was that that procedure should be incorporated in the Bankruptcy Act.

2842. If we give the Board of Trade power to prosecute that would achieve the same end even more simply, would it not? They are, after all, the public authority in charge of bankruptcy proceedings? - Yes. As a matter of practice the Director of Public Prosecutions goes straightaway to the police.

2843. So does the Solicitor to the Board, I think. If they can both do it that is perhaps the ideal arrangement. - As the position obtains in companies "where any report is made under the last foregoing section to the Director of Public Prosecutions, he may if he thinks fit refer the matter to the Board of Trade for further enquiry". So we have both departments engaged in companies, and the suggestion is that bankruptcy procedure might be made to link up with voluntary liquidation.

2844. We will consider whether we should incorporate something corresponding to that. - That is the suggestion.

2845. That brings us, I think, to deeds of arrangement, and I gather you do not want the Board of Trade control over them extended? - No.

2846. The first suggestion with regard to deeds by your professional advisers is in connection with the debtor's affidavit. Do you think it would do if we required him to give such details of his property as are required in a statement of affairs in bankruptcy? - That would be admirable.

2847. Mr. Emerson: I do not think there would be time. Sometimes deeds of arrangement and deeds of assignment are constituted at very short notice, and the debtor can only give an estimate. Would you not agree it would be impossible to value the whole of his stock and book debts accurately? - Undoubtedly. The Chairman, however, put forward a suggestion that similar data to that required in a statement of affairs in bankruptcy should be supplied. A bankrupt does not value his stock in any way accurately. He gives an estimate of his assets and liabilities. The suggestion put forward in the memorandum for the consideration of the Committee is to prevent a debtor merely putting an omnibus figure of his assets without details, and at a subsequent date no-one knowing exactly how that omnibus item was made up, giving him loopholes in connection with undisclosed assets. It is suggested that the present form of debtor's affidavit should be extended to include as a further schedule a statement setting out particulars of the debtor's assets. At present it is merely one omnibus statement which says the "total estimated amount of my property included under the deed is £X".

2848. Chairman: It might perhaps be a practical idea if time prevented his giving the full details to have some provision that he could sign an affidavit in the present form for the purpose of implementing the deed, provided that without avoidable delay he should file a subsequent affidavit giving the details required in a statement of affairs. - I think myself if he is in a position to estimate his assets and swear on oath his assets are such a sum of money, he must by force of circumstance be in a position to say how he arrives at his estimate.

2849. Mr. Lloyd Williams: Does he, in practice, with the statement of affairs? - He sets out what his assets purport to be in detail but they are all estimated sums.

2850. Is that very much better than an estimated lump sum? - I suggest it is because it shows the assets he has disclosed and how he arrives at his figure. If there is merely an omnibus item no-one can tell how he arrived at that estimated sum.

2851. Mr. Emerson: If he is going to omit an asset deliberately, surely he is going to omit it? He will do it whether he is making a detailed statement or a comprehensive one. - My suggestion is that if he has to make a detailed statement he admits an omission. As the matter stands at the moment there is no evidence; he merely has to up-value something else to get at his estimate.

2852. Chairman: As we are talking in terms of omnibuses I was wondering whether if, in any particular case, the difficulty Mr. Emerson foresaw prevented his making in the first instance an affidavit showing his assets in any detail, it would not be possible to arrange for what one might call a relief omnibus to come along a bit later and contain those details which you would like to see contained. - That might be a practical solution. For my own part I do not consider it is impossible or difficult for a debtor to give details of how he arrives at the estimate when he swears the affidavit.

2853. I think the next group of observations you make are concerned with the form of the deed of arrangement. Do I take it you would like to have a model deed of arrangement scheduled in the Act? - I think it would be desirable, yes.

2854. Then you would not make a rigid rule that it should be adhered to, but you would make it a rule that any departure from it should be notified to the creditors when they are asked to assent? - That is correct.

2855. If that were done do you not think that some provision would have to be made that mere accidental failure to notify a departure from the statutory form should not of itself invalidate a deed? - The point there would arise whether there was non-disclosure of a material fact. The point which prompts these suggestions is the arrangement, which exists at the present time under a deed of assignment, that the assignment can be of all the debtor's assets or of only part of a debtor's assets, and no information need be given to creditors when they are asked to assent as to what is included or what is omitted. The result is that trade creditors seeing or hearing the words "deed of assignment" conclude that it is of all the debtor's assets and they may well find that it omits quite a number of important assets.

2856. Mr. Emerson: I see you suggest the deed of assignment should include the whole of the debtor's property. Does that include leaseholds? - No.

2857. Chairman: You certainly would not convey leaseholds to the trustee. - No. There are some leaseholds and property burdened with onerous covenants that are now omitted.

2858. Mr. Lloyd Williams: Have you no standard printed form? - It is used sometimes.

2859. But always added to? - It is often varied.

2860. Would you like to see Section 17 of the Deeds of Arrangement Act repealed? That is the Section which permits preferential payment to creditors if the deed provides that there may be such a payment. I rather gather you would like something put in its place which forbids all preferential payments. - I would like the Act amended as suggested in No. 4 of the memorandum submitted "that the disposition of assets between creditors should be with like priorities and in all respects as in bankruptcy".

2861. In all deeds? - Deeds of assignment for the benefit of creditors.

2862. That would be something which would be obligatory to have in your deed? It would not be possible to contract out? - I would like to see the deeds of arrangement linked up as far as possible with the realisation and disposition of assets in similar manner to that which obtains in bankruptcy, and I would like to cut out elasticity of action as far as possible because I fear that creditors, when assenting to deeds of assignment, do not realise the loopholes which exist under the present law.

2863. Mr. Emerson: Do you not find nearly all the deeds provide that suing costs prior to the execution of the deed should be paid in full? - They do, yes. That is a point.

2864. You want to exclude that? - They would be excluded if there were a statutory form of deed. I think they would have to be excluded, but that might be covered by the fact that any divergence from the statutory form would have to be disclosed. But I am opposed to giving elasticity without disclosure.

2865. Chairman: Then it comes to this, that you would like to see the model form of deed but would allow any departure from it that was desired, provided that departure was disclosed? - Yes, that would be all right.

2866. That is a summary of what you would like? - Yes.

2867. That brings us on to the next question of the one outstanding creditor who tries to upset the appellation by putting on a bankruptcy petition. Perhaps I might tell you briefly what we are proposing to do about that. First of all, if the act of bankruptcy relied on is the execution of a deed or any act ancillary to the execution of deed, we propose to cut the time of petition down to one month. Secondly, we propose that if a bankruptcy petition is put on within three months after the execution of deed and it appears to the Court that either the object is, to put it in a word, "blackmail", or that a receiving order is not what the majority of the creditors want or is against their interests, the Court should have express powers to dismiss that petition. - I would suggest that the period in which a non-assenting creditor can petition should be limited to 21 days after registration of the deed, not one month, the reason being that the creditors have 21 days from registration in which to assent, and I think that a creditor should be compelled to make up his mind within that period whether he will assent or whether he will go to bankruptcy. That is why I say a period of 21 days and if he has not petitioned within that time then he should be debarred from petitioning and quoting the execution of the deed of assignment as an act of bankruptcy.

2868. There is one other thing we were proposing to do as regards deeds with which I think you agree. We are proposing, if the deed is superseded by bankruptcy, that the trustee under the deed should be paid not only his reasonable expenses but his reasonable remuneration as a first charge on the assets. - I think that is fair and reasonable.

2869. So do I. The man may have done a lot of work; why he should do it for nothing is hard to understand. - Theoretically he has been a trespasser.

2870. I do not quite follow why you want to alter Section 23 of the Deeds of Arrangement Act. Does that not give the trustee adequate power of going to Court? We were merely proposing to cut out some surplus words from that and make it a bit simpler. - The suggestion was to give a trustee power generally to apply to the Court for directions, which I do not think presently obtains under Section 23. Section 23 surely is limited to applications to the Court for an interpretation of the trusts of the deed.

2871. "Or enforcement of the trusts"? - Yes.

2872. You would like to see some words put in: "or for directions"? - I would like to see it linked up with the Companies Act, if possible, giving the trustee power to apply to the Court for directions.

2873. It would be simple enough just to incorporate the words "or for directions" in that Section. It might be a good idea to do that. - Yes, the Bankruptcy Act, Section 79(3) gives power in bankruptcy.

2874. You would like to see a similar power for deeds of arrangement? - Yes.

2875. Would you like to say anything more about your idea of extending Section 25 of the Bankruptcy Act to deeds of arrangement? It is a novel idea. What you want is for the deed trustee to have power to

examine witnesses under Section 25 without necessarily turning the whole administration into bankruptcy? - Yes, that is the procedure. The Association rather feels that a deed trustee has not the overriding powers of a trustee in bankruptcy. They have no power whatever over the debtor. If the debtor fails to give information one can do nothing about it at all, and in the absence of procedure being incorporated in the Act for public examination or even private examination of the debtor, it is suggested that if the provisions of Section 25 of the Bankruptcy Act, which give to a trustee overriding power to question privately any person who is capable of giving information relating to the debtor and his conduct of affairs, that such a power should also be given to a deed trustee; also to question the debtor on oath, privately, not publicly, as to his assets or dealings.

2876. It has been suggested - we were considering it very favourably - including in the Deeds of Arrangement Act a provision whereby if the debtor has been guilty of misconduct, whether before or after the execution of the deed, the trustee could apply to the Court to have the administration transferred into bankruptcy, which would carry with it of course the power to examine under Section 25 and many of the other powers which you have mentioned. That I take it would have your approval? - That would, it would have approval. I suggest it would be rather a costly procedure which might be obviated by adopting the suggestion under Section 25 to obtain information.

2877. It is an entirely novel idea, is it not? I do not think it has been put forward before. - No. It was really designed to try to obtain particulars of undisclosed assets, which one cannot obtain under a deed of assignment.

2878. The last thing you suggest about deeds of arrangement is that they should be advertised. Several other witnesses have suggested that. Is it not one of the advantages of a deed of arrangement that there is a certain amount of privacy about it? - Yes, but the advantages also have the disadvantages. Particularly I have in mind such undisclosed assets as life policies, and with no advertisement of the deed of arrangement there is no notice to the world. No. 10 of our suggestion was designed to give notice to the world and endeavoured to catch undisclosed assets. In the same way No. 9 was suggested, again to try to obtain particulars of undisclosed assets.

2879. Mr. Peirce: An announcement in the trade gazettes is thought to be insufficient? - An announcement in private gazettes is not deemed to be notice to the world, whereas in the London Gazette it is notice to the world.

2880. Chairman: Although in effect probably a higher proportion of the world reads them than reads the London Gazette? - Yes. I suggest it would be of considerable advantage for a deed of assignment to be advertised in the London Gazette, not only for such things as life policies, but undisclosed bank accounts and such matters as that.

2881. You think the advantages outweigh the disadvantages? - I cannot see any disadvantage except to the debtor, and he has to meet his creditors' wishes.

2882. A rich uncle comes along and might be prepared to put up money if the insolvency is kept under the counter, but not if the man has been gazetted. - Yes, but unfortunately there are few rich uncles and, even so, where there is a rich uncle and the debtor is well advised, as a rule matters can be carried through by means of an informal composition without the necessity of a deed of assignment.

2883. While we are on that subject, do you see any necessity to register deeds under which no property is conveyed or is about to be conveyed by the debtor to a trustee? - No, certainly not, because the whole object of registration is to catch undisclosed assets.

2884. Then there is no advantage in registering? - There is no advantage in registering.

2885. Mr. Emerson: The Association make many suggestions for tightening up the Deeds of Arrangement Act. I wonder whether they concur with one previous witness that we should abandon deeds of arrangement altogether. - I consider the procedure of deeds of arrangement is very beneficial if properly controlled.

2886. Chairman: I do not quite understand why you suggest that it should be made incumbent on an undischarged bankrupt to disclose in writing that he is undischarged. Would that be of great advantage to anybody? - I think it tightens up the question of evidence.

2887. If the person from whom he obtains credit happens to have lost the document it might make the question more difficult. - The idea, I think, behind that suggestion was that where a bankrupt incurred credit for upwards of £10 without disclosing the fact, when he is prosecuted he will say he disclosed it and there is no evidence whether he did or not. It is merely oath against oath; whereas if he is compelled to do it in writing the matter should be easier. At the present time he has to disclose that fact and he can disclose it verbally.

2888. If he can say falsely that he disclosed it verbally, he can also say falsely that he declared it in writing. - He could, but then the aggrieved creditor who has supplied goods to him without receiving an intimation that he is an undischarged bankrupt would then say that he has not any evidence in writing.

2889. The last matters you deal with are the vexed questions about preferential claims. Do I understand you to be in favour of abolishing altogether the preferential claims on rates? - Yes, I would be in favour of that.

2890. Have you considered the fact that the rating authority cannot so to speak choose its customers? It has got to supply police, for instance, for the benefit of the insolvent as well as the solvent. - Yes, certainly that obtains. The suggestions put forward were that there should be limits to the amount. In the other words if a rating authority - rates are due when they are made - neglects to collect the rates within a reasonable time, I can see no reason why it should have any preferential rights.

2891. Then you deal with assessed taxes. We thought - I do not know whether you would agree with this - that instead of being entitled to pick their year over an indefinite number of past years the Inland Revenue claim to be paid in priority should be restricted to one of the last two or three years before the receiving order, presumably the last but one in a majority of cases. Do you think that a reasonable restriction to impose? - Yes, I certainly think there should be a definite restriction and that they should not be entitled to claim different years for different classes of tax as now obtains.

2892. Yes, take one year and stick to it for all. - Yes, they should only claim one year.

2893. You would like to abolish prior rights for Pay as You Earn altogether, would you? - No. I suggest these prior rights again be limited to a short period, say four weeks. There again the position is that under the regulations PAYE is due to be paid over at the end of each four weekly period, and if the Inland Revenue neglect to collect it is difficult to see why they should have preferential rights over other creditors.

2894. In a sense it is rather in the nature of trust money, money which the bankrupt has deducted when paying other people, and he ought to have it intact for them in a separate account. - Certainly, but there again the trust money, if it could be so interpreted, should be paid over at four weekly periods, and if the Revenue neglect to force the people to pay over

the money which they hold for them in trust, it is difficult to see why they should have prior rights at the expense of other creditors.

2895. We were proposing to recommend the payment, before any of the existing preferential payments, of not more than one week's wages or salary, not more than £25 per man, for clerks, servants, workmen and labourers. Would you approve of that or not? That would be on account of the wages etc., for which they are preferential. - As a pre-preferential claim?

2896. Yes, so as to enable the business to carry on for a day or two and that sort of thing. - Yes, that might be a reasonable provision, but I would also suggest that amendments be made to the period of wages and salary claims.

2897. Would you be in favour of reducing it? - Yes.

2898. From four months to what figure, say two months? - Yes, right down to two months. I would suggest one month in the case of workmen and two months in the case of salaried employees.

2899. Are there any other of the existing preferentials you would like to see reduced or cut out? We have dealt with tax and so on. - It has not obtained at present in the Bankruptcy Act but I should be very loath to see any extension of the Bankruptcy Act to bring it in line with Section 319(4) of the Companies Act.

2900. We are very much against that. - It is a subject on which rather strong opinions are held and I thought I would raise it. I do not think there is anything else under the preferentials.

2901. Mr. Sherwell: I wondered why you wanted to reduce the preferential claims of clerks or servants to one month. - To be practical. They do not work without pay for such long periods and it seems to be unnecessary to give extended periods under an Act of Parliament which are not met with in practice.

2902. If they did happen to work without pay for that period and were owed it for four months, you think they should not have it? - No. If they choose to give extended credit I see no reason why they should be placed in a substantially better position than any other creditors.

2903. Bearing in mind they are people who very often have no option? We are dealing with the lowest class. - My view is that they have an option. They are weekly or hourly servants and they have the option the same as anybody else. They can give a week's or an hour's notice according to the terms of their employment.

2904. Chairman: Thank you, Gentlemen, we are much obliged to you.

(The witnesses withdrew)

Wednesday, 5th December, 1956

Present

HIS HONOUR JUDGE BLAGDEN	(Chairman)
Mr. H. BEER, C.B.	
MR. C.R.M. EMERSON, F.C.A.	
MR. H. LLOYD WILLIAMS	
MR. H.R. PEIRCE, O.B.E., J.P.	
MR. N.B. SHERWELL, O.B.E.	
MR. B.R.P. MACTAVISH	} Joint Secretaries
MR. C. ROY WATERER, I.S.O.	

MEMORANDUM SUBMITTED BY
BUILDING INDUSTRY DISTRIBUTORS

ITEM 3(1)

Statement: Whether, and if so, how the Bankruptcy Acts should be amended in regard to the discharge of bankrupts. Comments on the scheme outlined in the Appendix to this letter would be particularly appreciated.

Answer: It is considered neither necessary nor desirable to interfere with the existing provisions for the discharge of bankrupts; especially in the circumstances referred to in the proviso to Sub-sect. (2) of Sec. 26 of the Act in which the Court shall refuse or suspend discharge or discharge on condition. It is submitted that a time limit, whether of two years as suggested or of longer duration, with almost a formal certainty of discharge at the end of that period, would encourage bankrupts to with-hold assistance in realisation of assets, or to with-hold information regarding assets. Any such relaxation would be contrary to the best interests of the trading community and would tend to cause an increase in the number of bankruptcies and a reduction in the sums recovered by creditors.

The criticisms of the detailed suggestions under this head are therefore only of interest if, in spite of the general objection so made, the scheme is still to be seriously considered:-

Appendix (a)

Statement: At the end of a certain period (two years is suggested) after the conclusion of the Public Examination of the bankrupt, every bankrupt would become automatically discharged unless a caveat were entered on the Court file against such automatic discharge.

Answer: In a complicated case, the administration of the bankruptcy might well exceed two years. Since in a number of cases the amount of the dividend payable to the creditors may be increased by the receipt of after acquired property, then if a time limit is to be applied at all where the discharge is to be automatic, that time limit should certainly not be less than five years. The main merit of the suggestion would appear to lie only in the convenience of the Official Receiver or the Trustee in Bankruptcy being able to file away his papers. It is not in the interest of the creditors, who, in our opinion, are the persons entitled to the main consideration on this point.

Statement: This caveat would be entered at the conclusion of the Public Examination on the application of the Official Receiver; or of any creditor who had proved his debt and was present; or on the initiative of the Court. The Registrar would take into account the evidence of the bankrupt, as given in his answers at his Public Examination, and upon hearing the applicant for the caveat thereon, would decide whether the bankrupt's conduct and financial dealings leading to his bankruptcy were such as to render it undesirable in the public interest that the automatic discharge should take effect. In that event, the Court would enter the caveat and at the same time fix a day, time and place for the hearing of the bankrupt's discharge.

Answer: The time at which the caveat is to be entered should certainly not be limited to "the conclusion of the Public Examination". Nor should the persons entitled to enter the caveat be limited to the Official Receiver or a creditor who had proved his debt and "was present". It could often happen that a creditor could not be present at the Public Examination, but he should have the opportunity of being heard on the application for lodging a caveat if he subsequently has a report of the proceedings and, in the light of his own knowledge and after consideration of the report, considers that the discharge should not be automatic. If the procedure is to be adopted at all, the caveat should be capable of being entered by the Official Receiver, the Trustee or any creditor at any time before the discharge of the bankrupt, whether on application of the bankrupt or by effluxion of time.

Furthermore it is not equitable that the creditors should be put upon proof as to why the caveat should be entered. The caveat should enter on the mere application of a creditor, perhaps with some prima facie evidence (say, by affidavit) in support; the onus of showing that the bankrupt is entitled to discharge should be upon the bankrupt as now applicable under Sect. 26.

It is considered that the words "in the public interest" as used in (b) are inadequate. The public interest may well be to prevent a rogue from contracting further debts, but the interest of the creditors in the present bankruptcy are of great interest especially to those creditors. In any event the caveat should apply, or discharge should not be automatic if:-

- (i) the bankrupt has been bankrupt on one or more previous occasions; or
- (ii) the bankrupt has committed any offence or misdemeanour under the Bankruptcy Acts; or
- (iii) any of the facts mentioned in Sub-section (2) or the proviso to Sub-section (3) of Section 26 are applicable.

It is important to note that under the existing law, the conduct of the bankrupt during the proceedings under his bankruptcy are taken into account under Sect. 26; this conduct during the bankruptcy is an important factor to be taken into account before the discharge should operate. Provision should be made for this factor to be considered and this is repeated in support of the contention that if this scheme is to be adopted at all, the caveat should enter at any time before the the discharge.

Statement: Any bankrupt whose discharge was refused by the Court would be required to keep the Official Receiver informed of all changes of address, to account to the Official Receiver at the end of

every six months as to all his financial transactions and any after acquired property or earnings and to attend upon the Official Receiver as and when required.

Answer: We agree in principle except that this should apply to all bankrupts unless the Court orders otherwise in any particular case, and we suggest that:-

- (i) All bankrupts should be required to attend upon their Trustee at intervals of three months (unless the Trustee with the consent of the Committee of Inspection, should extend the interval to not exceeding six months). On such occasions the bankrupt should bring to the Trustee accounts and details of his earnings, expenses and after acquired property.
- (ii) Before obtaining the discharge, the bankrupt should be required to attend upon the Trustee and give similar details.
- (iii) The Trustee or the Official Receiver should have power to require the bankrupt to attend upon him at any time after adjudication to give details and answer questions relevant to the administration of the estate. This should be a simplification of, and in addition to the existing powers of examination under Section 25. It is suggested by some of our members that this power to require production of details of the estate should include power to require the production of Income Tax Assessments or copies of Income Tax Returns.

Appendix (d)

Statement: If any bankrupt who had not a caveat entered against him were not satisfied to await the period when he became automatically discharged he would have the right to apply for an earlier discharge at any time after the conclusion of his Public Examination. In that event his application would be dealt with in the same manner as under the existing provisions of Section 26.

Answer: We agree that the existing provisions of Section 26 should remain in force.

Appendix (e)

Statement: Provision would be made for the automatic discharge of all existing undischarged bankrupts provided they had not been bankrupt on more than one occasion and the Court had not refused their discharge.

Answer: The position of bankrupts adjudged before the passing of the proposed new legislation presents a separate problem. If the original suggestion as in (b) is approved, then since the Public Examination has been closed, there would be no opportunity of entering a caveat. If our suggestion (still made under protest) on this point is accepted then provision must be made for a caveat to be entered at any time before discharge, and the discharge should not be available (except under the provisions of Section 26) until the expiration of two years (or preferably five years) from the commencement of the new Act. We still consider that discharge should be determined by the merit of the bankrupt and there should still be ample opportunity to differentiate between the bad and the "unlucky" man. We also urge that the provisions of Sub-section (9) of Section 26 should most certainly be preserved.

ITEM 3 (2)

Statement: In relation to a second or subsequent bankruptcy where the bankrupt remains undischarged from a previous bankruptcy, whether assets acquired by the bankrupt after his previous bankruptcy should be applied in discharging the debts owing to creditors in the second

or subsequent bankruptcy in priority to any debts remaining owing in the prior bankruptcy.

Answer: On this point there are two schools of thought amongst our members:-

- (i) In favour of the suggestion are those who contend that the debts ranking in the second or subsequent bankruptcy have been incurred on the strength of the assets in the possession of the bankrupt at the time the debts were incurred. These may be represented by the value of work being carried out by the bankrupt as in the case of a builder who, in spite of his earlier bankruptcy is honestly trying to re-establish himself. In such cases it is argued that the creditors in the second bankruptcy are entitled to look to these assets to provide the dividend on account of their debts, and this argument is strengthened where the earlier bankruptcy had occurred a considerable time before.
- (ii) The other members argue that the principle of "first come first served" should apply and that the creditors in the second bankruptcy should have been aware of the fact that they were trading with an undischarged bankrupt and took the risk, therefore not meriting any priority in the subsequent bankruptcy.

The second suggestion is affected greatly by the action taken under the heading 3 (4) in relation to the trustee's powers to deal with and claim after acquired property; and on this point it is suggested that the decision in *re Walter, Slocock v. The O.R.* (1929) 1 Ch. 647 should not be disturbed.

It is the opinion of the Executive Committee of this Association that the second suggestion is the better, and therefore it is submitted that the existing provisions of section 3 of the Amendment Act 1926 should be altered to provide that as a general rule after-acquired property should vest in the first Trustee and form part of the assets of the first bankruptcy, but that the exceptions should be

- (A) priority to be given to debts incurred in the second bankruptcy (payable out of the after-acquired property vesting in the first bankrupt) where the debt does not exceed the limit referred to in Section 155 (a) - whether this is the present £10 limit or as may be revised.
- (B) the Court to have power to order in the circumstances any variation of the general rule as to the priorities to be observed.

ITEM 3 (3):

Statement: The desirability of increasing the monetary limits prescribed by the Bankruptcy Acts so as to take account of the fall in the value of money, particularly those relating to a petitioning creditor's debt and to the estimated value of assets to enable an Order for Summary Administration to be obtained from the Court.

Answer: In general we consider it not desirable to increase the monetary limits prescribed by the Acts. Although these limits were fixed many years ago, the value of money is not the only consideration. The limit of £50 under Section 4 would in 1883 have represented a large sum, but the number of merchants receiving or granting credit would have been much reduced compared with the present day. In other words there are today many more people obtaining credit, and obtaining that credit from several different creditors. The total indebtedness may be high, but the individual debts may still be under the £50 limit and it may not always be easy for one creditor to contact other creditors at this stage of the

proceedings, in order to present the bankruptcy petition. The smaller creditor is entitled to the assistance afforded him in dealing with the debtor by the pressure of bankruptcy proceedings.

In considering the possible amendment of the limit of value for clothing bedding and tools of trade under Section 38 (2) regard should be had to Section 8 of the Small Debts Recovery Act 1845 where the limit is still £5 in claiming exemption from execution. The decisions in *Re Dawson* (1899) 2 Q.B. 54 and in *Re Sherman* 32 T.L.R. 231 should also be borne in mind.

It has been suggested that a "means test" might be applied to allow the exemption of clothing, bedding, tools of trade etc. to the value of £15 for the debtor, a similar sum for his wife and £10 for each child under 15, but it is appreciated that even these sums may not be factual or in accord with current values. It is known that the £20 limit has not in practice been observed for many years and therefore there is a real justification for bringing the limits into accord with present day values, so that the law may not suffer the indignity of being ignored because it is impractical.

Since formulating the above suggestions it is now appreciated that provision for extension of the limit under section 8 of the Small Debts Recovery Act 1845 and certain other Acts has been made under section 37 of the Administration of Justice Act 1956 but it is submitted that the provisions of section 37 should be extended to permit the similar amendment of section 38 of the Bankruptcy Act 1914.

ITEM 3 (4):

Statement: The advisability of limiting the vesting of after acquired property to such property as may be claimed by the trustees.

Answer: It would be unwise to disturb the provisions in favour of purchasers for value without notice. The ability of the Trustee or the Official Receiver to obtain information regarding after acquired property should however be strengthened by requiring the bankrupt to make his report to the Trustee periodically on the lines suggested under Item 3 (1) (c) above to make disclosure of after acquired property.

ITEM 3 (5):

Statement: Whether creditors should be able to appoint the Official Receiver as trustee in a non summary case.

Answer: There may be circumstances in which the Creditors might think it appropriate to appoint the Official Receiver to be the Trustee, and this may well apply in the case of a second or subsequent bankruptcy.

ITEM 3 (6):

Statement: Whether provisions should be made for a conclusion of the bankruptcy where the debts are paid in full (with statutory interest) and a re-vesting of the surplus in the bankrupt without the necessity for any documentary transfer by the trustee.

Answer: In relation to freehold property and property not normally transferred by an instrument of transfer, it would be possible to include in the order for the discharge of the bankrupt a vesting declaration, or to empower the Court to make a vesting order subsequently to and notwithstanding the order for discharge; but difficulties could arise in relation to the re-vesting of leasehold property, and also in the case of stocks and shares.

ITEM 3 (7):

Statement: The enlargement of the provisions of Section 51 of the Bankruptcy Act, 1914 to cover all kinds of earnings including the wages of workmen.

Answer: This suggestion is definitely considered desirable. It is to be appreciated that the provisions of Section 51 at present apply only to the earnings of officers of the Army and Navy and civil servants of the Crown. The present day rate of earning by other members of the armed forces and by artisans and others justify the extension of this Section to apply to all earnings from any type of employment or business, and that in the case of a civil servant the consent of the superintending officer of the department should no longer be required.

ITEM 3 (8):

Statement: An amendment whereby all prosecutions for offences under the Bankruptcy Acts may be instituted and carried on by the Board of Trade in lieu of the Director of Public Prosecutions.

Answer: It is suggested that the need is not so much to transfer the power of prosecution to the Board of Trade from the Director of Public Prosecutions as to encourage more frequent use of the power to prosecute. It is submitted that if such prosecutions were undertaken it would operate as a very salutary deterrent to the great advantage of the commercial and industrial integrity of this country.

ITEM 3 (9):

Statement: With regard to Deeds of Arrangement, what provisions are desirable in order that there may be a more effective control by the Board of Trade over the administration of assets vested in a trustee under a Deed of Arrangement.

Answer: A Deed of Arrangement is a private arrangement between a debtor and his creditors, and it is considered that the less statutory control there is, the better. Duties of a trustee in relation to the Deeds of Arrangement Act, 1914, are felt to be sufficiently comprehensive and do not require extension.

In practice a Deed of Arrangement properly drawn should include provisions for the removal of the trustee and the appointment of a new trustee by the Committee of Inspection or by a meeting of Creditors convened for that purpose. One or other of the common form clauses usually employed for the removal of a trustee and the appointment of new trustees could usefully be adapted as a provision of the Act, but we do not think it necessary to extend the power of removal to the Board of Trade. So as to prevent injustice to certain trustees who are professionally engaged in the administration of insolvent estates, it might well be considered that Section 19 (1) of the Bankruptcy Act 1914 should be amended to provide that the disqualification of a trustee who has been previously removed from the office of such trustee may be relieved by the Court upon application made by the "removed" trustee, supported if the Committee think fit to so recommend by the Committee of Inspection concerned or by persons intending to appoint or support the appointment of the trustee in another bankruptcy.

ITEM 4. :

Statement: In addition to possible legislation on these points, there will necessarily be many other amendments of the Bankruptcy Acts and the Deeds of Arrangement Act which are considered desirable either to clarify questions of doubt or to facilitate administration in the light of experience over the past forty years and the

Committee would appreciate suggestions relating to any such points of doubt or difficulty.

Answer: We consider that an amendment is necessary in the law relating to deeds of arrangement. In practice it frequently happens that after the majority of creditors have assented to a deed and sometimes as long as three months after such assent, an individual creditor issues a bankruptcy petition which may even rely on the deed as an act of bankruptcy. In this way the wishes of the majority of the creditors are flouted, or, alternatively, the dissentient creditor obtains an unjust preference over his fellow creditors. If the bankruptcy petition proceeds as far as adjudication the solicitors or accountants who have been engaged in administering the trusts of the deed find themselves unable to recover their fees for the work they have done. The result in some cases is that the trustee does the absolute minimum during the first three months after the deed is executed.

We suggest that Section 24 (1) of the Deeds of Arrangement Act 1914 needs strengthening in the light of this experience and recommend that:-

(1) No creditor shall be entitled to present a Bankruptcy Petition against the debtor founded on the execution of the deed or on any other act committed by him in the course or for the purpose of the proceedings preliminary to the execution of the deed as an act of bankruptcy after the period of 21 days from the date of registration of the deed unless the deed becomes void for want of assents. This would limit the right of the creditor to the same period as that fixed for signifying assents to the deed.

(2) If the trustee under a deed of arrangement, which either is expressed to be or is in fact for the benefit of the debtor's creditors generally, serves in the prescribed manner on any creditor of the debtor notice in writing of the execution of the deed, the creditor shall not be entitled to present a bankruptcy petition against the bankrupt founded upon any act of the debtor whatsoever committed prior to the execution of the deed as an act of bankruptcy unless he serves upon the trustee notice of his intention to do so within three weeks of receipt of such notice as aforesaid or unless the deed becomes void for want of assents.

16th November, 1956.

FURTHER MEMORANDUM SUBMITTED BY
BUILDING INDUSTRY DISTRIBUTORS

In addition to the representations already made on behalf of Building Industry Distributors in the letter addressed to the Committee on the 16th November 1956, it is desired that the following points may also be considered by the Committee under the heading Item 4 of the memorandum issued by the Committee. Power to appoint Interim Receiver - Section 8 Bankruptcy Act 1914 provides that "the Court may, if it is shown to be necessary for the protection of the Estate, at any time after the presentation of a Bankruptcy Petition, and before the Receiving Order is made, appoint the Official Receiver to be Interim Receiver of the property of the debtor"

The appointment of such Interim Receiver is further dealt with under Rules 157 to 161 of the Bankruptcy Rules 1952 and under these Rules it is clear that the Court is not to exercise its power of appointing an Interim Receiver under Section 8 except on the application of the creditor or of

the debtor. The application must be supported by an Affidavit - Rule 157(2) - and the applicant is required to deposit with the Official Receiver the sum of £5 - Rule 158 - and from time to time such additional sums as may be ordered by the Court - 159(1) -

It is suggested that it would be of convenience if the Rules could be amended to provide that the powers given by Section 8 could be exercised by the Court upon the hearing of the Petition or of any other stage in the proceedings without specific application by a creditor or the debtor being required, and without calling for a deposit to be made under Rules 158 or 159. Power to stay pending proceedings - It is provided under Section 9 of Bankruptcy Act 1914 that the Court may at any time after the presentation of a Bankruptcy Petition stay any action execution or other legal process against the property or person of the debtor.

In the case of *in re Richardson* (86 L.T. 690) referred to on Page 86 Williams Bankruptcy 16th Edition, doubt is expressed whether in any case a County Court can stay an action in the High Court, although it is admitted that in the case referred to the decision was that on the facts the power to stay, even if it existed, ought not to have been exercised. Since jurisdiction in bankruptcy is given to the County Courts under Section 96 Bankruptcy Act 1914 it is suggested that Section 9 should be amended to make it quite clear that the stay of proceedings can be ordered by any Court (including a County Court) having jurisdiction in bankruptcy.

29th November, 1956.

EXAMINATION OF WITNESSES

Mr. Richard Leslie Crowther	}	Representing Building Industry Distributors
Mr. Frank Hardy		

Called and examined

2905. Chairman: May I say thank you very much for this fresh memorandum you have just handed in to us; we have had a chance to look at it. Is there any more you want to say about those two subjects? -

(Mr. Crowther): I think it is expressed very fairly here. I do not think we have anything to add to it. I met the point in practice only during the last two weeks.

2906. We will bear it in mind when we are considering the rest of your evidence, if we may. Do you know anything about the previous Committees that have considered this discharge question? Did you know there was a Committee in 1906 and another in 1924? - I did not know that.

2907. As a matter of fact, they both recommended reforms of the discharge procedure, which were not carried out on the ground of expense. Do you know the estimated number of undischarged bankrupts there are at the moment? - I understand it is 40,000.

2908. Between 30,000 and 40,000 it is thought to be. I do not know if you agree that one result of that is that the undischarged bankrupts who really need watching cannot be watched properly because there are not enough eyes to watch them? - It is a point that had not occurred to me, but I appreciate that is true.

2909. We felt very strongly that if some system could be devised by which the sheep were separated from the goats it would be possible to keep a strict eye on the goats. It seemed to me to be eminently desirable, does it not to you? - From that point of view, I would agree I think. Our point has been that whereas once upon a time the bankrupt, or rather the debtor, who could not pay was thrown into prison without any opportunity,

the bankruptcy law was introduced for his protection, and the swing of the pendulum has in our opinion gone the other way, and now it is the creditor who needs some protection. It does seem on the face of it that the automatic discharge would tend to protect the bankrupt rather more than the creditor, bearing in mind one or two points which have recently come to our notice. It was reported to me only a fortnight ago that, in the case of a bankrupt who had been made bankrupt before the war, he had recently found that he had become possessed of certain assets and was now only at this time paying a dividend to his creditors - to the joy of his creditors, to their surprise. Had he been automatically discharged, they would not have had it.

2910. Is it your view that if a man's conduct has been such that he deserves to be discharged in say eighteen months, or whatever period it may be, the Court should suspend his discharge merely in the hope of assets coming in? - No, that would not be fair.

2911. I agree. - I have been present at too many applications for discharge to feel that. I have asked for too many discharges to feel that; but if he has not troubled to obtain his discharge, then it does seem fair that the creditors should gain the advantage of the after-acquired assets.

2912. I do not myself quite see why the creditors should benefit merely because the bankrupt is so foolish as not to apply for his discharge. Of course they do, I appreciate that. It is in the nature of a windfall, is it not? - Yes.

2913. Mr. Lloyd Williams: I do not know whether you have considered that quite a number of people might have paid their debts in full were they not frightened by the publicity of an application for discharge? Rather than have any further publicity, they just do nothing. - It would surprise me to know that that was so.

2914. We had one particular instance given to us where a man had made good; he was a very prominent citizen in a big town. The mere fact that he did not want any publicity at all meant that he did nothing, whereas in fact he could have paid his creditors in full, but he would not risk an application because of the publicity. - I should have thought that was very much an isolated case.

2915. Chairman: Would you agree that the hope of getting a discharge is one of the incentives that sometimes prompts bankrupts to perform their statutory duty? - I am sure of it. I feel most strongly that the honest man does try to pay his debts, and he would at any rate endeavour to pay sufficient to justify making an application for discharge, but if it was automatic, that incentive I think is lost.

2916. Is it? You see, what we envisage is that the two year period of suspension is also a period of probation. If he does not behave himself during that two year period that is just the sort of thing that is going to invite an application for a caveat. - Under the amended scheme that would be permitted?

2917. Yes. I take it, by the way, that you consider the amended scheme to be at least a lesser evil than the original scheme? - Very definitely, a great improvement. It may not be a convenient time to interpolate this, but I do feel the creditors should have the right to seek a caveat.

2918. During the two year period? - during that period.

2919. Cannot they jog the elbow of the Official Receiver if something calling for a caveat comes to their notice? - How far would the Official Receiver allow his elbow to be jogged? We have no assurance of that.

2920. It depends on the complacency of the particular Official Receiver. - And the insistence of the creditor.

2921. Mr. Emerson: The committee of inspection would jog the trustee's elbow, and if he refused to move, the committee would go to the Official Receiver and say "Our trustee will not move here, what are you going to do about it?" I should have thought there was enough machinery in practice; they could use the Official Receiver, could they not? - As a last resort, but it is a cumbersome procedure.

2922. Chairman: What we have been afraid of is that you would get cases where time and money were wasted by a malicious creditor making application after application for a caveat. - I appreciate that. I did hear this comment, of course, on Monday, and the feeling in my mind was that a creditor might make one application for a caveat but should not be permitted to make a second or subsequent application except through a committee of inspection, or through the Official Receiver or trustee.

2923. I take it you do of course appreciate that whether the discharge came automatically, or whether it came on a bankrupt's application, equally it would not put an end to the bankrupt's duty to assist the administration of his estate, as is the case at present? - Theoretically, I would appreciate that. In practice, I think it would be rather an empty obligation; I do not think he would be called upon to fulfil it. I think in practice the papers would be filed away.

2924. I do not know. You point out that some complicated administrations take very much longer than two years to complete. - Yes, that has been my experience.

2925. It occurred to me that that might perhaps be a false point, because after all his duty to assist in the administration is not terminated by his obtaining his discharge. - I appreciate that.

2926. Talking of putting the papers away, you say at the foot of page 1 of your memorandum -

"The main merit of the suggestion would appear to lie only in the convenience of the Official Receiver or the Trustee in Bankruptcy being able to file away his papers".

Is that meant seriously or not? - To some extent yes. I do not want it to be taken too seriously, but that does seem to be the paramount motive. I appreciate from what you have said this afternoon that there is the other motive of assisting the bankrupt himself and to cover the case of a man who is afraid to make his application for discharge, but very largely the first appeal of this scheme did appear to be with the object of filing away papers.

2927. I gather you now realise that there are at least some more commendable motives behind it than that? - There are some.

2928. In the original memorandum you had, in 1(1)(ii) the words were used "any creditor who was present at the time of examination". - Yes.

2929. As you have probably noticed, we are proposing to make it "any creditor who has proved". That would partly meet the point you make? - Yes, very largely.

2930. I am not quite clear about this. We envisage an application for a caveat being made by the Official Receiver etc., but the actual entry being made by the Court. Is it your idea that the caveat should be something which any creditor or the Official Receiver can enter as of right, like issuing a writ or buying a postage stamp? - No. I had imagined that it would be an application for a caveat, for a caveat to be entered at the discretion of the Court if the creditor satisfied the Court that it should be.

2931. That is what we thought, but in the third paragraph on your second page you make the recommendation that the caveat should enter on the mere application of a creditor. I did not know if that was what you meant? - No, I think it should be construed as meaning that the right to make an application for the caveat should lie with the creditor.

2932. I thought that was probably what you meant but I was not quite certain about it. - I am sorry that was not clearly stated.

2933. Again, I take it that at the end of the paragraph before that, that is the second paragraph on page 2, your last clause "whether on application of the bankrupt or by effluxion of time" applies to the discharge and not the caveat? - The caveat should be capable of being entered on the application of the Official Receiver, the trustee or any creditor at any time before the discharge of the bankrupt.

2934. Yes, the whole of the rest of the sentence must refer to the discharge, must it not? - It must do. I am sorry if that is not clear, but it does. The discharge by effluxion of time in two years, or by application under Section 26.

2935. I cannot envisage any circumstances in which a bankrupt would apply for a caveat against himself? - It was intended to cover the discharge and not the caveat.

2936. Do you really want to have a provision that the caveat should be entered in every case where any of the facts set out in subsection (2) of Section 26 are present, or rather that there should be no automatic discharge in those cases? - There might be some exceptions, but the feeling of our members when discussing this question was that Section 26 does provide some protection for the general public inasmuch as, if these facts which are considered under Section 26 to justify the withholding or the postponement of the discharge are present, they should also apply here to the entering of a caveat.

2937. That would mean that there would hardly ever be an uncaveated bankrupt; in practice there would never be an uncaveated bankrupt? - If those facts were present, and they were facts which were considered material for consideration in dealing with an application for discharge under Section 26, surely it would be fair that the caveat should be entered?

2938. I should have thought that it all depended on the circumstances. You might get a very bad case of trading with knowledge of insolvency, or you might get a case in which the man had in fact traded with knowledge of insolvency but he had got his creditors' permission to do so, in which case the whole sting of the offence has gone. I should have thought the proper course would be in the former case for the Official Receiver, or trustee, or a creditor to apply for a caveat, and in the latter case let the automatic discharge go through. - We had said that in those events the caveat should apply, that the discharge should not be automatic; in other words, that the Court should decide.

2939. Even if there is no caveat, the discharge is held up in the absence of an application by the bankrupt for two years, which is probably a longer period of suspension than he would get if he made an application. - If he made an application early on.

2940. But a very surprisingly low proportion of bankrupts who apply for their discharge are suspended for more than two years. - I suppose that in any case in practice these facts would be the facts which would be before the Court when considering the application for the caveat.

2941. I fancy so; we always envisaged that they are bound to be taken into account. As regards the original proposal that a bankrupt whose discharge was refused would be required to keep the Official Receiver informed of changes of address and so on, we are now proposing to make it any bankrupt against whom a caveat is entered. That I think you would probably approve of as far as it goes, would you not? - Assuming that the procedure is adopted, yes. We do feel that, in practice, this question of regular appearance at the office of the Official Receiver or trustee to give information can be most useful in dealing with after-acquired property, and in dealing with earnings. The virtue of it will be greatly enhanced if there is any suggestion from your Committee of altering the provisions of Section 51.

2942. I will tell you at once about that; we are trying to make Section 51 as wide as we possibly can so as to embrace every single class of earnings one can think of. That would be in accordance with your ideas? - Yes.

2943. The trouble is, is it not, that if you make things equally hot for the people one might call the sheep as for the goats, there is precious little point in being a sheep. - I fully appreciate that too, but if you assume that you have your two years automatic discharge then Section 51 becomes even more valuable, and the honest man who has not a caveat entered against him loses the penalty of Section 51 when he is discharged, does he not?

2944. Yes, that is so now, but we were going to make it perfectly clear that the Court could make an order under Section 51 which would be effective after discharge, and I think you agree that is desirable? - It could be in certain cases, but would the man be discharged while still agreeing to make payments out of earnings, is that your intention?
2945. Yes, for instance you might get the case of a man who was a potential big earner, and it would be only right in such a case that any order setting aside a proportion of his salary should continue after his discharge. - In other words, subject in effect to judgment being entered for that sum?
2946. That would be the effect of it. We were rather envisaging not so much a judgment but an order to pay a certain proportion of whatever he earned. - That I think would be fair.
2947. If we are going to adopt any scheme of automatic discharge, we have got to make some provision for existing bankruptcies, bankruptcies which are in existence when, if ever, the new Act comes into force. Briefly, what we thought of doing there was this. First of all, if the man has applied for his discharge and an order has been made either granting it or refusing it, the new Act should not affect it. Secondly, the scheme dealing with existing bankrupts would not apply to anyone who had not surrendered, or whose public examination had been adjourned sine die, or whose discharge has been refused - that we have already dealt with - or to a person who has previously been adjudged bankrupt, or to a person who has been convicted of any bankruptcy offence. All those people would continue to stay in their own jules, just as if the new Act had never come into force at all. For the other people, we were proposing that they should get an automatic discharge two years after the passing of the Act, unless a caveat were applied for and entered during that period. - I think that is quite consistent with the scheme.
2948. When I say two years, I am assuming we take two years for the other period, but whatever period is chosen it would be the same. Apart from the objections you have to the scheme in itself, those arrangements for dealing with existing bankrupts would be fairly reasonable? - That would be quite right and fair, yes.
2949. I gather you are divided in your opinions about what is to happen on a second or subsequent bankruptcy? - There is always much argument about that point.
2950. It is a very difficult subject. - I did hear your suggestions as made on Monday evening, and, although it is not strictly in accordance with my brief, I do support the suggestion that you put forward then that, in the second or subsequent bankruptcy, the second lot of creditors should be paid a sum equal to the dividend paid in the first bankruptcy, and thereafter they should all rank *pari passu*.
2951. One difficulty is that if no dividend has been paid for the first bankruptcy we are back exactly where we are today. - Yes.
2952. Perhaps that is not a great disadvantage, I do not know - what do you think about that? - It is such a difficult question, I do not really think you can improve upon the suggestions you have already made. I do not know whether the Committee have considered whether, if the trustee has power to call the debtor in to him to give information from time to time, that will strengthen the trustee in obtaining details of after-acquired property, as such after-acquired property which becomes available in the second bankruptcy but which should already have been used to pay the creditors in the first bankruptcy.
2953. He has got power now to require a bankrupt to attend on him as and when required, and presumably he is exercising it. - I wonder in practice how often it is used, and whether some encouragement could be given to the trustees. It always seems to me, when I hear of a second bankruptcy, that the trustee in the first bankruptcy must have been out of touch to enable this man to have these assets in a second bankruptcy; they should have been brought into account in the first bankruptcy.

2954. Mr. Peirce: I suppose that much of that information would come to the trustee from the old creditors. It is more likely that the old creditors would have this information long before the trustee had it, so really it is the creditors' responsibility to inform the trustee, is it not? - In practice, that is the only way in which the trustee finds out.
2955. Chairman: One witness surprised us very much - I do not know if it has been your experience - by saying that very often, if not in the majority of cases, the people who have been the creditors in the first bankruptcy are the creditors in the second bankruptcy too. - I think that very often is so.
2956. It surprised me very much, because I should have thought the general tendency of a burnt child was to avoid the fire. - I doubt if traders will ever learn. If they do burn their fingers they will always hope that this time he is going to be a good boy and pay.
2957. Mr. Emerson: Talking about after-acquired property, we are considering putting a new duty on the bankrupt to disclose all after-acquired property. - That I think would be very helpful, and would cut down the number of second bankruptcies.
2958. Chairman: It would tend to certainly, though we hope also of course, if our scheme for dealing with discharges goes through, that would tend to reduce the number of second bankruptcies very materially. - Yes, it does occur to me there that where a man has been discharged and then there is a subsequent bankruptcy, are the creditors in the first bankruptcy to rank again after he has been discharged and in respect of assets which have been acquired after the discharge from the first bankruptcy?
2959. I do not think we envisaged that. After all, the discharge operates as a release from pretty well all the debts. I was talking about a second or subsequent bankruptcy supervening while he was still undischarged. - So that to a very large extent the provisions for the ranking of debts as between the two bankruptcies will themselves disappear by virtue of this automatic discharge?
2960. So we hope. While we are on the subject of after-acquired property, you did hear a bit of the discussion on Monday about the supply of necessaries to the bankrupt after the bankruptcy? - It was I think on one of the cases to which we have referred in our paper, *Re Walter*.
2961. You refer to page 4 to *Re Walter*. We thought of putting in a provision that, if the trustee claims after-acquired property and gets it, he could get it subject to a first charge of the payment of necessaries, which would put the baker and the butcher in the same position as the undertaker in the decision of *Re Walter*. Would you support that? - I would suggest that, I think it is right and proper.
2962. It is in fact the practice at the moment, but there is no express statutory sanction for it. In effect, if we did that, it would to some extent meet the point you make where there is a second bankruptcy, namely, about priority being given to small debts incurred in the second bankruptcy? - That is so; I had appreciated that.
2963. If the people who had supplied him with necessaries since the first bankruptcy were getting a first charge on any after-acquired property, there is less incentive to make him a bankrupt a second time? - That could well happen, yes.
2964. You want to keep the £50 limit for a petitioning creditor's debt, do you not? - As a lawyer, I would say very definitely yes.
2965. Not increase it? - Not increase it, for the reasons given in the statement.
2966. Do you really think it is desirable to have a sort of scale of figures as regards the exempted property under Section 38? - It has been suggested by one of our secretaries who deals quite a lot with insolvencies

- that this test should be applied of so much for the man, so much for his wife, so much for each child, in order to cover the value of his bedding, clothing, and so on, and there does seem to be some virtue in applying a scale per person of the family.
2967. It would be difficult I should have thought to find what figure would be a proper figure in these days when the value of money fluctuates and tends generally to decline. - Very difficult. Curiously, the Small Debts Recovery Act, 1845, which has been amended only this year has not made a very great increase in the figure; they have only brought it up to £20.
2968. It is four times the old value of £5. - Yes, but it is still a very very small sum.
2969. It is probably less than £5 was worth in 1845. - Probably, yes.
2970. I fancy they put in £20 merely to bring the Section into line with Section 38. - Presumably.
2971. The last idea we had about these excepted properties in Section 38 was to leave it to the Official Receiver or trustee to decide what was necessary in the way of furniture and clothing, and so on, and put a limit on necessary tools of his trade, £100 being suggested as the limit. I do not know what you think about that? - Do I understand that the Official Receiver in that case would have a discretion, and he might in a certain case say that £20 is the right limit.
2972. He might. - He would have that discretion?
2973. Yes. The trouble with clothing, bedding and so on is that circumstances vary so much individually. If the bankrupt were a clerk in Coutts Bank he has got to have a frock coat; if he is a dustman, he does not need a frock coat - in fact, he is better off without one. - I would imagine if he were made bankrupt he would cease to be a clerk in Coutts Bank.
2974. He might be an undertaker's mate and still have to have a frock coat. - Then he would not have much to be available under Section 54. I think there that the real thing is that we creditors do feel very strongly that a man should not keep for his family, jewels, fur coats and things of that nature.
2975. They are always his wife's, are they not? - Usually, and for that reason this £20 figure in practice may be regarded as his own clothing and the clothing of the infants.
2976. You would not be in favour of taking his wife's property to pay his debts, however affluent his wife, would you? - I have felt very strongly in favour of that from time to time in the absence of proof of what I have suspected.
2977. I am assuming the thing is genuinely his wife's and not a sham, but if the thing is genuinely his wife's, his wife is entitled to it? - If the thing is genuinely his wife's, his wife is entitled to it, but in so many cases we doubt the genuineness of the application.
2978. That is a question of fact in each particular case. You cannot reasonably expect to have a clause in the Act to go through the bankrupt's wife's property to pay his debts? - I do not think so, no.
2979. As regards the appointment of the Official Receiver in non-summary cases, you would probably agree the amendment we suggested on Monday meets the case? - Making it permissive?
2980. Yes, so that the Board of Trade can sanction what is in fact the practice at the moment. - Yes.

2981. As regards annulment as distinct from discharge do you see any difficulty about a process which might best be described as adjudication in reverse, whereby the property goes back automatically to the bankrupt without any need for a formal re-transfer from the trustee? - The difficulties as I see them might arise in the case of the re-vesting of leasehold property and in the case of stocks and shares. Where we have the appointment of a new trustee by order of the Court, it is still necessary to take formal steps to complete the vesting of stocks and shares. Therein would lie a certain difficulty, and because of that it does seem to me that if there are assets which should be properly re-vested in the bankrupt on annulment then the order, when being made as an order of annulment, could include if necessary a vesting declaration.

2982. I appreciate that, in the case of shares, you would probably have to register them with the secretary of the company, or something like that. - You would have to have share transfers; share transfers would have to be executed pursuant to the order.

2983. But if there were a large number of shares in different companies, that might involve a great deal of bother might it not? - It usually does.

2984. Mr. Emerson: It would almost take the same form as probate, sending round to the various offices? - If you register probate with the company it is merely a notification to the company, it is not effective as a transfer. You then have to produce the transfer of the shares pursuant to that probate. That does lead me to think of one other point, that if you provide for a vesting order, or for automatic vesting, then it would be fair to include in the Act provision that the stamp duty on the transfer should be a nominal stamp duty of not more than 10s., similar to the exemptions applicable on appointing a new trustee, and so on.

2985. Chairman: You could exempt it from stamp duty altogether? - It could be done.

2986. Mr. Lloyd Williams: Would it not only attract a nominal stamp duty now? Is it not one of the exemptions? - It is not; they are specially covered and rather jealously guarded by the stamp duty authorities. If you cannot bring your case within those exemptions you pay ad valorem duty.

2987. Chairman: I asked your friends who were here on Monday whether, where debts are paid in full, the Court should have discretion to annul, or whether the annulment should be compulsory. Have you any views about that? - I would say it should be discretionary.

2988. That means, does it not, that if the bankrupt's rich uncle is toying with the idea of paying his debts in full, it may put him off if he cannot be advised with certainty that his bad nephew will get out of the scrape? - It may have that effect, but justice surely does require that the Court should give consideration to the point.

2989. We felt it was one of those points in which ethics and expediency are in conflict, and it is rather difficult to say which should prevail, but if the man is all that bad he is not going to escape prosecution by reason of payment in full, and we thought perhaps expediency might be allowed to prevail in this instance. - From the creditors' point of view there is a great deal to be said in favour of it.

2990. In fact, can you really see any point in keeping a bankruptcy which is really a hollow shell in existence? All the creditors have been paid, and there is nothing more to be done. I agree a man would be precluded from obtaining credit of more than £10. - I could think of other analogies. If I steal and I am brought to Court, if my rich uncle - I have not one unfortunately - came along and offered to pay the money in, I am afraid I would still be prosecuted.

2991. So would the bankrupt who is paying in full who has committed a bankruptcy offence. Annulment and payment in full will not discharge him from liability for prosecution. - I would like to think that was so; in practice, I am afraid it would not be.

2992. At all events, in theory it is. - In theory it is right.

2993. I think I told you just now that we were proposing to enlarge Section 51 to make it as wide as we possibly could? - You did.

2994. I wonder if you have any views about this. In the case of a servant of the Crown, not only a civil servant but any servant of the Crown, the Court at present cannot make an order without the consent of the head of his department. The principle I think is quite clear, that Crown service has not to go on and it does not tend to an efficient navy if an admiral is reduced to a state of absolute penury; but we thought of substituting for the consent of head of the department a requirement that the Court should communicate with the head of the department. Would you approve of that? - It certainly is an improvement.

2995. We wanted to provide that the head of the department could not override the Court; to provide that the last word was with the Court. In other words, he could be heard, his views would be considered, but he would not have a veto, so that he could not overrule the Court, which I think has been a great objection so far. I believe the way the power is used at the moment is that the Navy, for instance, will not allow an order under Section 51 against the commanding officer of a submarine, or against a navigating officer, because they feel the worry of it might render them inefficient in their duty and endanger the lives of others. But it seemed to us the answer was that if they were afraid of the man being worried they could employ him in some less dangerous capacity, for example by giving him a shore base for a while. - I believe - this is purely comment on what is existing law - it is true that you still cannot make an order under Section 51 against an R.A.F. squadron leader, or any other officer of the R.A.F.

2996. The same considerations would apply; the Court would have to communicate with the Secretary of State for Air. - As I read the law at the moment, you can only apply this Section to an officer of the Army or the Navy.

2997. Yes, you are right about that. We are proposing to bring in the Royal Air Force; we are including everybody, A.T.S., W.A.A.F.S. and all the rest of them too. I see you want steps to be taken to encourage more frequent use of the power to prosecute, but I do not quite see how we can do that by legislation. Can you make any suggestions? - That really arose from the suggestion that came from this Committee that the power to prosecute should be vested in the Board of Trade instead of in the Director of Public Prosecutions. I have found from experience that the Board of Trade, when dealing with company matters - and you may remember that the procedure in company matters is that we make the report to the Board of Trade and the Board of Trade then consult with the Director of Public Prosecutions with a view to prosecution - are most loth to prosecute even in cases where the creditors have been absolutely exasperated by the attitude which has been adopted by the director of the company. In those particular instances the difficulty has arisen that in so many cases under the Companies Act it is necessary to prove scienter. They must prove that the man did it knowing it was wrong, made a statement knowingly or recklessly. The Board of Trade have proved almost impervious to any suggestions that a prosecution should be launched, saying "We cannot prove it; if we take that case we shall fail". They are so convinced they are going to fail in their prosecutions that they never take one. If that sort of attitude is going to be adopted, can this Committee in some way offer comment that will stir them to take a little more lively interest in prosecuting the offender?

2998. We cannot do anything about companies, of course; it is quite outside our orbit. But I do not think you will suffer quite so badly in that respect in the case of bankrupts because it is so much simpler to convict

a man of a bankruptcy offence than it is a Companies Act offence for the very reason that scienter is very easily proved where it has to be proved at all. - So far as taking the work from one department to another, from the Director of Public Prosecutions to the Board of Trade, is there any great virtue in that except that you encourage building up a department within the Board of Trade to deal with these prosecutions?

2999. The departmental machinery is already there. The Solicitor of the Board of Trade can deal with it perfectly well, and it seems to us that from a practical point of view it is more convenient. - From that point of view, yes.

3000. As regards deeds of arrangement, you say, and we agree with you, that broadly speaking a deed of arrangement is a private scheme and the less outside interference there is the better? - Yes.

3001. Bearing that in mind, would you be in favour of a model deed being scheduled in the Act or not? - As I heard it described on Monday evening, I think there is quite a lot of virtue in the suggestion. At the moment in practice there are precedents for deeds of arrangement and, generally speaking, I suppose those precedents are adopted, but most of the accountants who specialise in this type of work at some time or another have tried to cure the difficulties with which they have to contend by protecting themselves under the deed. They have their deeds printed, they are commonly used, and very few people who are asked to consent ever read them. I have drawn some of these deeds, and I am therefore aware of some of the reasons for the inclusion of certain clauses which have protected the trustees. I think sometimes some of the deeds I have seen - I will not say some of the deeds I have drawn - have operated unfairly against the creditors.

3002. If you did have a model deed you would permit deviations from it, would you not, provided the creditors were all notified? - Yes, and then it would be a simple matter to draw attention to any deviation from that deed.

3003. What sort of provision would you suggest to deal with the case of accidental omission to mention a deviation? - That I think should be provided for; it should not invalidate the deed.

3004. If the trustee or the debtor's solicitor, or whoever is advocating the deed, purposely omits to tell the creditors of the deviation, that would invalidate the deed? - A very difficult argument! you are again coming back to the Board of Trade reaction - how does one prove scienter?

3005. We have felt all along if you are going to have a model deed and then you are going under any condition to permit deviation from it, you are going to get into great practical difficulties. - It may well be on reflection that the use of a model deed would not be practical for that reason, because you would lose the flexibility.

3006. Yes, we are feeling very doubtful about it; that may be the answer. - I think on reflection on those points it would be so.

3007. I see you feel - this is harking back rather to bankruptcy - that a trustee who has been removed through misconduct should not be disqualified automatically from being a trustee again? - At the moment he is automatically disqualified, and there is no provision for relief. I could imagine if certain other suggestions which I understand have been made were adopted, and if, as we had ourselves suggested, provision were made for the removal of a trustee, not necessarily because of misconduct but because, for some reason or other - ill-health or pressure of other work - he was not getting on with it fast enough, if the creditors said "We would like a new trustee appointed" - if he were removed for that reason, and that would be a new reason in my experience, then it would be unfair for him to be penalised for ever against acting as a trustee in the future. Therefore, he should be able to come and have his name cleared.

3008. Of course he can appeal against an order removing him, can he not? - He can appeal against an order; I was assuming he does not.
3009. The case you are envisaging is really one in which he is removed for some reason other than misconduct; he is removed because he is ill and then he subsequently recovers his health. - Yes.
3010. Mr. Emerson: Why does he not resign? - He may do so, but some of these trustees can be quite pig headed.
3011. Chairman: You do not want pig headed trustees? - They are most useful at times in dealing with a debtor.
3012. We are proposing to introduce into the relevant Section where the creditors are empowered to appoint some fit person as trustee in bankruptcy the words "some fit person having such professional qualifications as may be prescribed and not being a creditor". I do not know what you think about that? At the moment theoretically anybody can be a trustee in bankruptcy. - I can speak quite freely because I am not an accountant. I am a lawyer and therefore not normally called upon to act as a trustee. If I were asked I would refuse. I have known of a number of trustees who did not possess the qualification of chartered accountant or membership of some other recognised body of accountants. They have been most effective, trustworthy, honourable trustees. They have specialised in their work. They may have started as clerks in the office of a chartered accountant or a qualified accountant who specialised in that work, their principal may have died and they have carried on, and they were permitted to do so. Even today, in spite of the charters which have been granted to a number of professional bodies, I believe it is still the case that an accountant can call himself an accountant without any qualification by examination.
3013. Yes, certainly. For the matter of that he can call himself a turf accountant without any qualifications too. - Yes we have met those under this heading in bankruptcy.
3014. You really would not be in favour of that proposal, you would rather leave the law as it is, would you not? - If it were so, I think it would be only fair to make some provision, as is very often done when a charter is granted for the protection of a profession, that those who have been in practice for so many years, or in practice on a certain date, should be enabled to register as qualified men.
3015. Yes, but that of course would be a matter to be considered when it came to making a rule saying what the qualifications were to be. - If that were so, then I feel in justice to them that, if you are going to recommend such a rule, you should recommend that clemency should be shown to those men now in practice.
3016. It has been suggested to us rather ingeniously in connection with deeds that there might be machinery whereby, if the debtor has been guilty of misconduct either before or after the execution of the deed, there should be power in the trustee and the creditors to apply to the Court to take over the administration into bankruptcy. It is a rather novel suggestion; I do not know what you think about it. We were rather favourably impressed. - I think it would be very useful to have that power for a misdeemeanour committed after the deed of arrangement. In the case of offences committed before the deed was executed, I think it would only be fair to use that power if the fact was not known at the time the deed was executed. In other words, when the deed is signed the man should know where he stands. There should not be an entitlement after the deed has been signed to bring it up against him, or hang the sword of Damocles over his head for something that is known about when the deed is executed.
3017. What we had in mind was burying the family silver in the garden the day before executing the deed, or something of that kind. - Yes, or buying his wife a fur coat.
3018. Another thing which you might be kind enough to help us about is this. We thought of reducing the time for a bankruptcy petition founded on a deed of arrangement to one month. - Yes, I heard that. I understand that with the week and the 21 days we are at the same date as the date for assent to the deed.

3019. You probably remember we were talking on Monday about where a petition was presented at any time within three months of the execution of the deed the Court should have power to dismiss it if it thinks its object is extortion or if it considers a receiving order is not in the interests or is against the wishes of the creditors generally. - That I think would be very useful. That would in fact meet a point which had been made to us - I am not quite sure whether we incorporated it in the paper we submitted - that in some cases a trustee under a deed is deterred from getting on with the job or incurring any expense because he is waiting until the deed is confirmed. I think we have made that point.
3020. I think I also mentioned on Monday, and you probably remember it, that we propose to include a provision that where a deed is voided by bankruptcy the trustee should be entitled not only to his expenses but to his reasonable remuneration. - That I think would be fair and reasonable, and would overcome this difficulty which I have mentioned so that he would then get on with the job straight away of protecting the assets.
3021. There is only one other matter I wanted to ask you about, and that is this. We were proposing in the fraudulent preference Section to include a provision that a payment made either after a petition in bankruptcy or within three weeks before it, which has the effect of giving a preference, should be capable of being voided irrespective of the debtor's intention. I do not know what you think about that? We were going to except payment for current necessities, the weekly bill for the milk, or something of that kind. - Three weeks before the act of bankruptcy?
3022. Before the petition. - Before the petition would be out of step with the instructions now given to the sheriff to hold moneys for fourteen days on levying execution.
3023. We were proposing rather drastically to alter the execution Section. I ought to have told you about that. I think I ought to tell you about it before you give your views on this point. Very briefly what we are proposing to do to simplify all this business about execution is to provide that if the execution creditor can manage to hold the goods or money for 21 days without notice of a petition he is home. If he gets notice of petition within 21 days he has got to cough up. - That is 21 days instead of 14?
3024. Twenty one days, to correspond with what we are proposing for the fraudulent preference Section. - That does tie up with the note I gave in before we came in tonight on the question of the County Court being able to stay proceedings.
3025. Yes, we will have to consider that. - I had this instance only a fortnight ago. There were four executions in against a particular person. The debtor asked for clemency, for a delay, and I argued that it was dangerous inasmuch as those execution creditors could go ahead. The executions had been ordered by the High Court, and I was speaking on a petition in the County Court which had bankruptcy jurisdiction and therefore should have had the right to stay the proceedings in the other Courts. But it has been doubted, and I think probably rightly on existing legislation, whether the County Court has power to stay proceedings in a higher Court. I think it should have that power if it has jurisdiction in bankruptcy.
3026. It should have that power if necessary; we shall have to recommend putting something in to make it clear that it has. But I do not think that really affects what we are proposing about executions, because all the petitioning creditor would have to do is to serve notice that he has presented a petition, and whether the execution was stayed by the Court or not would not very much matter; the money would have to come back to the trustee eventually. - I am not quite sure; I will leave it with you to consider. I am not quite sure what would be the position if the petition is presented but no order is made for some time, if it is adjourned and adjourned.
3027. You would surely agree that the present position is rather absurd, under which a man cannot safely pay the creditor he wants to prefer before a petition, but if he waits until after a petition is presented he says "That is not in the fraudulent preference Section, and I will now pay him". It is absurd, you agree with that? - Yes, but it has been most convenient sometimes.

3028. Could you just give us any other views you have about this three weeks' proposal as regards an absolute preference? - I think that is right. For one thing it is fair to the sheriff; it is fair to the man who is pursuing a prior claim to protect his own rights and has to put his hand in his pocket and pay the sheriff's fees and everything to get his money.
3029. That is the execution? - Yes.
3030. What about this absolute preference, the last three weeks? - For necessities?
3031. No, not for necessities; we are excepting current necessities. What we are dealing with is payment of a debt in the last three weeks. If it is in the last three weeks it would not matter whether it was paid under pressure or what the intention is. - That that money has to be brought into account? I think that would be quite fair in view of the other comments about the execution creditors and so on. It brings him into line with that, and I think it would be fair.
3032. Thank you very much. I have nothing else I want to ask you. I do not know if any other members of the Committee have. - There were some comments made on Monday when I was here. I do not know whether I can read my writing sufficiently to know what was said then on one or two points, but may I raise one or two other points which come out of that?
3033. Yes, certainly. - It was mentioned that there was a ground for disturbing the existing rules as to preferential payments, and there is a great deal to be said for divesting the Crown and the local authority of the preferences they now enjoy. That preferential authority, if I may support what was said on Monday, is really a denial of the right or of the liability upon the Crown that the Crown should be the keeper of the people's conscience. The Chancellor is the keeper of the Queen's conscience and should do justice, should give an example to the people on how they should deal with their debts and their liabilities and so on. It seems grossly unfair and does create a great deal of unrest and dissatisfaction in the minds of the general body of creditors that the Crown should retain by statute a preferential right to these moneys. I have seen many cases where, after a great deal of trouble taken by the Committee of inspection, at expense to themselves and without remuneration, they have realised certain assets which have gone wholly in the payment of taxation, and it does lead to a great deal of unrest. I feel quite strongly that those rights should be reduced.
3034. Would you be in favour of reducing them, or abolishing them altogether? - In my heart of hearts I would like to see them abolished, and they should rank with the general creditors. But if the Crown is going jealously to keep its right, and the income tax authorities usually will do so, then I think their rights should be drastically reduced, it has been suggested for one year, and they should choose the same year for income tax and surtax, which I think is fair, if they use it at all. But it might also be that they should be limited to the last year, the current year, at a time when the man is doing badly in his business, so badly that he cannot even pay his creditors.
3035. If you limit it to the last year you might just as well abolish it altogether. - I am hoping that will be the effect of it. The suggestion was also made that there should be a distinction between clerks and servants and artisans. It was suggested that the clerk or servant should have a priority for four weeks' pay and the artisan one week's pay. I do not agree with that line of thought.
3036. You do not? - No, because the man who is in difficulty in business may sometimes persuade his staff to help him go through a difficult time, they may work without wages for a while, and if he does come unstuck it is grossly unfair to let them lose their priority. I think they are in every case entitled to their priority there, I have a great deal of sympathy with them. The point that does cause difficulty is the bank account which is used for the payment of wages.
3037. Not in bankruptcy surely? In companies winding up, not in bankruptcy? - In companies winding up. Again I am inclined to think of them both as the same; I appreciate today they are different. That bank account has caused a great deal of difficulty.

3038. You would not be in favour of introducing into bankruptcy the priority given to the banker who has advanced money for wages? - I do not think so, it has caused too much difficulty and unrest, and has in many cases been abused in the case of companies.

3039. In fact, we feel it is putting a premium on trading with knowledge, and where trading with knowledge is taking place it is really giving the burglar's assistant the first charge on the swag. - The man draws the wages cheque as a wages cheque, and does he use it for the payment of wages? It is very difficult to prove how he has spent it. I think I have exhausted the notes I have made, and I am very much obliged to you for listening to me on these additional points.

3040. We are very much obliged to you for bringing them up.

(The witnesses withdrew)

LETTER RECEIVED FROM MR. R.L. CROWTHER.

BUILDING INDUSTRY DISTRIBUTORS

Aldrich & Crowther,
48, Preston Road,
Preston Circus,
Brighton, 7.

13th December, 1956.

B. MacTavish, Esq.,
Board of Trade.

Dear Mr. MacTavish,

Building Industry Distributors
Bankruptcy Law Amendment Committee

I am very grateful to your Committee for the courtesy extended to Mr. Hardy and myself when we attended before your Committee on the 5th instant.

I have not yet seen the verbatim report of the comments then made, but on one point I would like to add a thought to what was then said.

Your Chairman mentioned the intention of the Committee to recommend that any payment made during twenty-one days preceding a petition in bankruptcy, would be avoided, irrespective of intention to prefer or defraud, with the exception of payments made for "necessaries".

May I, very respectfully, submit that if this is done, the Committee should make some recommendation as to what action should be taken:-

(A) in respect of payments made during the twenty-one days:-

1. for goods delivered during the twenty-one days (a) on credit
(b) for cash.
2. for rent.
3. in satisfaction and clearance of a mortgage.

4. as consideration for the purchase of (a) land (b) stocks and shares etc.
5. in satisfaction or on account of a charge on land imposed (a) before, (b) during, the 21 days under Section 34 of the Administration of Justice Act 1956 or under any similar statutory provision.
6. in satisfaction of a judgment or order of the Court.
7. as a penalty imposed by a Court of Justice or a Court of Summary Jurisdiction.
8. as interest on a mortgage.
9. for wages of employees.
10. for stocks, raw materials etc. bought for cash and used in business or in hand.
11. for transport or delivery of goods.
12. for postages.
13. to Banks (a) on current account (b) on "wages" account.
14. as the price of e.g. a railway fare or for petrol or hotel expenses etc. for a holiday (not as a necessary).
15. as a donation to charity or as a gift for a birthday or wedding.

(B) in respect of charging orders made under Administration of Justice Act 1956 - How will such an order be discharged?

I believe that the Committee had in mind the further exemption of sums less than £10 but if the intention is to avoid all such transactions, then to take but one example under Head (A) 4(a) - money paid as a consideration for the purchase of land - this would mean that in practice on completion of the purchase of land, the Vendor will have to require that the purchase money be paid to a stakeholder for the twenty-one days - in case a petition is presented during that time.

It would also appear that great injustice could occur if a man selling goods for cash could, within twenty-one days thereafter be called upon to pay to the Official Receiver, the money he had been paid for the goods - It would seem that in justice, these transactions could only be avoided if it is possible to return the goods etc. in respect of which the payment was made and otherwise restore the status quo ante.

The Committee may have had these points and similar points under consideration, and if this is so I hope your Committee will forgive me for referring to the matter again.

Yours sincerely,

(Sgd.) R.L. Crowther

WRITTEN EVIDENCE
OF OTHER ORGANISATIONS AND INDIVIDUALS

LETTER RECEIVED FROM LORD CHANCELLOR'S OFFICE

Lord Chancellor's Office,
House of Lords,
London, S.W.1.

B. MacTavish, Esq.,
Board of Trade.

Dear MacTavish,

Committee on Bankruptcy Law Amendment

I am replying to your letter of the 16th January in which you asked for a note of the points which, in the opinion of this Department, might usefully be brought to the attention of the Committee. They are these:-

1. Meetings of Creditors: at present the relevant provisions are contained partly in the Act (Schedule 1) and partly in the Rules (Rules 239 - 247). There is no difference in kind between the two sets of provisions which are entirely procedural. The provisions should be either all in the Act or all in the Rules, not half and half. There is much to be said in favour of the Rules, which are more flexible.
2. Proof of Debts: the same arguments apply; at present the relevant provisions are in Schedule 2 and in Rules 248 - 262.
3. Definition of an Act of Bankruptcy: by section 1(1)(e) of the Act a debtor commits an act of bankruptcy if execution has been levied against him under process "in an action in any court, or in any civil proceedings in the High Court", etc.

These words do not appear to be apt to cover execution under an order of the Court of Appeal, because a proceeding in the Court of Appeal is not a proceeding in the High Court - see section 1 of the Judicature Act, 1925.

It could be argued that the definition of "action" in the definition section (section 225) of the Judicature Act is wide enough to cover an appeal to the Court of Appeal from the High Court or even the county court; however, that definition is expressly confined to the use of the expression "in this Act", and the Judicature Act was not in force when the Bankruptcy Act was passed; in its ordinary meaning "action" does not include "appeal", and even if the definition in section 225 is applicable it is not wide enough to include, for example, an appeal from the Lands Tribunal.

There is no reason in logic why execution under an order of the Court of Appeal should not have the same consequences in bankruptcy as execution under an order of the High Court. The apparent anomaly, and the doubts I have referred to, could be resolved by a simple amendment of section 1(1)(e).

4. Right of Bankrupt to Surplus: section 69 entitles the bankrupt to any surplus remaining after "payment in full of his creditors". Farwell, J., in Re Ward, 1942, Ch. 242, held that "creditors" meant "creditors who have proved", a decision which seems plainly right. He observed that "creditors" is used in the Act to mean sometimes "all creditors" and sometimes "creditors who have proved". It would make for clarity if both in section 69 and wherever else the Act refers to creditors it specified which class is meant.

5. Extension of time: Rule 389 gives the court a general power to extend time "for good cause shown".

Section 109(4) gives the court a similar general power without any mention of "good cause" - i.e. it leaves the discretion unfettered.

It was argued in an unreported case (heard on 25th October, 1954) that the Rule was ultra vires as being inconsistent with the section. The court did not have to decide the point, but there seems to be some substance in it. It is hardly necessary to define the court's power both in the Act and in the Rules, and in any event they should coincide. On the whole, the unfettered discretion granted by the Act would seem preferable to us.

6. Property exempted from division among creditors: section 38(2) protects the debtor's tools and bedding, etc. to a value of £20. In the Administration of Justice Bill now before Parliament it is proposed (by clause 37) to bring the value of goods exempted from execution in the High Court and county courts into line with bankruptcy, and further to provide for future increases in the "exempted value" by statutory instrument, so that a further fall in the value of money can be met without amending legislation. It is worth considering if there should not be a similar power to increase the limit of protection in bankruptcy.

7. Adjudication on failure of composition, etc.: Rule 219 empowers the court, on application, to adjudicate a debtor bankrupt if his creditors do not accept a composition or scheme at their first or first adjourned meeting. It is thought that the Official Receiver makes use of this rule to prevent the undue prolongation of receiving orders where creditors are dilatory.

The vires of Rule 219 were challenged in Re Fletcher, 1935, 3 W.L.R., 172 on the ground that it offends against the proviso to section 132(1) in so far as it purports to extend the jurisdiction of the court. The debtor argued that section 18(1) defines the only conditions in which the court can make an order. These conditions did not include failure to accept a composition or scheme at the first or first adjourned meeting of creditors, and accordingly Rule 219 which makes such failure a ground for adjudication was ultra vires.

The Court of Appeal had great difficulty in saving Rule 219, which they did by invoking the transitional provisions of section 168(3). If it is the Committee's view that the powers conferred by Rule 219 should be preserved, they ought to be conferred expressly by the Act.

We have also over the years collected a number of points arising on the Rules, but they are less likely to be of interest to the Committee and can be conveniently dealt with when the time comes for revising the Rules.

Yours sincerely,

(Sgd.) K.M. Newman

1. This memorandum is founded on the premise that bankruptcy law would be more generally and equitably used if some steps were taken to overcome the natural reluctance of any creditor to present a petition in bankruptcy against his debtor. This attitude results from the fact that the primary wish of a creditor is to be paid in full the debt owing to him without any regard to the position of his competitors.

2. Consequently creditors normally postpone the institution of bankruptcy proceedings each in the hope that his own debt will be paid in full before the debtor finally suspends payment. Many creditors believe that bankruptcy is an uneconomic procedure by which they usually extract only a small dividend from a slick debtor whose activities are scarcely restricted by what should be disabilities attached to an undischarged bankrupt. It is because of this impression that a creditor rarely presses his debtor to the stage of obtaining a receiving order against him if there is the slightest hope of extracting even a small sum on account of the outstanding debt by other means. Exceptionally, a creditor may be so incensed by treatment meted out to him by his debtor that he presses for a receiving order without caring whether any dividend will be received ultimately.

3. Another reason why creditors are averse to setting afoot bankruptcy proceedings is because they consider that often these result in little detriment to the debtor in that, although his assets and property are realized (at what are usually thought to be astonishingly low figures) the debtor continues to work in his employment and earns a salary or wage none of which is attachable for the benefit of creditors although it appears to the creditors sufficiently large to provide a surplus after meeting the reasonable living requirements of the debtor and his family. It is true that Sections 38 and 51 of the Bankruptcy Act, 1914 provide for the attachment of the earnings of a bankrupt. But these sections are hedged by so many restrictions and limitations as to prove of little value to creditors as was shown by a series of decisions early in this century which proved disastrous to any attempt to attach the salary or future earnings of a bankrupt. And the recent decision in re Tanton's application (1956) 1 W.L.R.128 indirectly illustrates the difficulties with which this position is fraught.

4. The question of what salary or wages has been received by a bankrupt from the date of the receiving order in practice is seldom raised until he applies for his discharge. At that stage sometimes the Court will take account of the earnings of the bankrupt by making an order for discharge conditional upon the bankrupt consenting to judgment for a named sum. At the best this is a belated attempt to assist the creditors who would much prefer to have obtained an order early in the bankruptcy directing the bankrupt to set aside for the benefit of his creditors a specified sum monthly or weekly out of his earnings. If this were possible the honest debtor would regard an order of this nature as a welcome assistance to him in his desire to pay his creditors in full. And against the dishonest debtor such an order would provide a weapon to extract some portion of his earnings for the benefit of his creditors who would then feel that the Courts were no longer shielding evasive debtors. Perhaps I have overpainted the picture yet there is a hard core of opinion amongst business men in wholehearted agreement with what is stated.

5. Another deterrent to the taking of action by a creditor by way of bankruptcy proceedings is that initially a deposit of £7/10/0 and a fee of £6 stamp on petition together with one or two minor fees must be paid by a petitioning creditor. Although these fees and the costs of the solicitors for the petitioning creditor are recoverable ultimately from the assets of the bankrupt, a business man who is asked by his solicitor to pay £25 to £30 as the cost of making his debtor bankrupt is apt to regard this as a case of throwing good money after bad even when

his solicitor explains that this money eventually will be repaid to him if the assets of the bankrupt suffice.

6. The Committee on Supreme Court Practice and Procedure in its report (Cmd. 8878) at paras. 442-445 considered the costs of bankruptcy petitions and recommended that the deposit of £7/10/0 should be abolished and the fee of £6 should be increased to £7/10/0. If this recommendation were adopted it would be a palliative which would render less difficult any attempt to convince a creditor that his best interests lie in presenting a petition in bankruptcy against his debtor.

7. But the initiative in instituting bankruptcy proceedings is not wholly in the hands of creditors. Of course any debtor can present his own petition by a mere declaration of inability to pay and Sec. 107(4) of the Bankruptcy Act, 1914 enables the Court itself to make a receiving order. This section in full reads as follows:- "Where, under Section 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit and in lieu thereof, with the consent of the judgment creditor and on payment by him of the prescribed fee, make a receiving order against the debtor....."

8. This procedure is important and useful on the hearing of a judgment summons in a County Court where the Judge is well aware of the financial difficulty of the debtor because of previous judgment summonses or other proceedings in the Court against him. Probably also these proceedings are a pointer indicating that the remaining assets are being seized by suing creditors and that bankruptcy would ensure equitable distribution of what remains. But the snag is that the making of a receiving order is conditional upon payment by the judgment creditor of the prescribed fee i.e. £13/10/0. This requirement often stultifies the effect of Sect. 107 because the judgment creditor is unwilling to pay the fee. If he had been prepared to pay this sum in the first instance he would have proceeded by the direct route of bankruptcy notice and petition.

9. Since procedure under this section is controlled by the County Court Judge who is probably well aware of the general financial position of the judgment debtor it seems reasonable to suggest that payment of any fee might be waived in these circumstances on the direct order of the County Court Judge. A further suggested improvement would be to provide that the County Court Judge could compel the judgment debtor to attend before him for examination before making a receiving order under this section. With these modifications it is suggested that Sect. 107(4) would be much more commonly employed and that the result would be the making of a receiving order at an early stage in a number of cases where now the Court is impotent although possessed of the knowledge that the debtor is insolvent and his assets are being frittered away.

10. To summarize:- I suggest that two changes would improve the atmosphere surrounding bankruptcy procedure which would render it more attractive to creditors and more beneficial and equitable to all concerned.

11. These are:- (1) An alteration in the position as regards the earnings of an undischarged bankrupt in such a way as to provide for the attachment for the benefit of creditors of such earnings, salary or income of an undischarged bankrupt as are not required for the essential living expenses of himself and his family. And (2) a change in procedure under Sect. 107(4) to enable a County Court Judge on the hearing of a summons for committal under the Debtors Act, 1869 to make a receiving order forthwith without any requirement that the fees normally chargeable should first be paid.

19th March, 1956.

Part I

Matters upon which evidence is particularly desired

1. Discharge of bankrupts and the Scheme to ensure that the discharge of every bankrupt is considered by the Court.

The number of undischarged bankrupts at present is, I understand, approximately 40,000 and it seems clear that only a fraction of that number can be supervised by the Official Receivers. This seems to me to be most undesirable as it may well be that a number of undetected small bankruptcy offences are committed by bankrupts who would have obtained their discharge if they had troubled to apply for it, and probably in circumstances which would make those offences quite harmless. In my opinion this is undesirable and I think, therefore, that the Bankruptcy Acts should be amended to ensure, as far as possible, that every bankrupt should be discharged within a reasonable time of his bankruptcy unless he is considered by the Court to be a possible danger to the community and should, accordingly, remain under the supervision of the Official Receiver.

Each of the Committees appointed in 1908 and 1924 to consider and report what amendments of the Bankruptcy Act were desirable, recommended an amendment of the Act to provide that the discharge of every bankrupt should be considered by the Court.

The implementation of the recommendations of those Committees would have ensured that the Court considered the discharge of every bankrupt without any disturbance of the existing procedure. Those recommendations, I understand, were not implemented because of the expense entailed. It seems to me, therefore, that to achieve this object without incurring additional expense it will be necessary to alter the existing procedure by providing for some form of automatic discharge of bankrupts.

The scheme outlined in the Appendix to the Committee's letter of the 2nd November, 1955, seems to me, in general, to be a workmanlike scheme for dealing with the problem. I have, however, the following comments:-

(a) The Court may lose, to some extent, its control over the discharge of bankrupts. Unless an application is made for a caveat a bankrupt will automatically be discharged and be released thereby from his debts, subject to the statutory exceptions, at the end of a specified period. Although the Scheme is headed "to ensure that the discharge of every bankrupt is considered by the Court" I am not sure that the Scheme in fact achieves this object. It is true that the Scheme provides that the Court can, of its own initiative, enter a caveat but this is a negative rather than a positive control. It may well happen that if no serious misconduct by the bankrupt is disclosed in the public examination and neither the Official Receiver nor any creditor applies for a caveat the discharge of the bankrupt will not be considered by the Court at all.

It is suggested, therefore, that the Court should be required at the conclusion of the public examination to consider whether or not a caveat should be entered on the Court file and should consider any report made by the Official Receiver and hear any representations which the Official Receiver or any creditor may wish to make.

(b) The shifting of the onus from a bankrupt to prove that he ought to be discharged to the Official Receiver to prove that the bankrupt ought not to be discharged may, if the application for a caveat may only be made at the end of the public examination, enable bankrupts to obtain their discharge who, for the protection of the public, ought to remain undischarged and subject to the supervision of the Official Receiver. The Official Receiver may, after the public examination has been concluded and before the automatic discharge,

obtain information which he thinks justifies an application for a caveat, whether or not he made such an application without success at the conclusion of the public examination.

It is suggested, therefore, that the Official Receiver should be entitled to make an application for a caveat at any time up to the date of the automatic discharge, and should be entitled to do so even though he has unsuccessfully made a previous application if there are further facts which, in his opinion, justify such an application.

(c) The proposal for the discharge of existing bankrupts seems to me to draw an unfair distinction between a bankrupt whose conduct had been so bad that he had not dared to make an application for his discharge and a bankrupt who had applied for his discharge and had his application refused. Under the Scheme the former would obtain his discharge and the latter would not. Furthermore, the application for discharge may have been refused many years ago. This proposal might also make it difficult to ascertain from the Court file whether or not a bankrupt had obtained an automatic discharge, since it would be necessary to search the file not only to find out whether an application for discharge had been made and refused but also if there has been no such application, to find out whether the bankrupt had been bankrupt on a previous occasion. It is suggested that it would be more equitable and convenient if provision were made that every bankrupt whose public examination had been concluded before the coming into operation of the Act and who was undischarged at that date should be discharged at the end of a specified period from the coming into operation of the Act, unless, before the expiration of that period, a caveat had been entered on the Court file.

(d) The Scheme leaves it entirely to the discretion of the Official Receiver whether or not he makes an application for a caveat and it might be considered whether, without prejudice to his right to apply for a caveat at any time, if in his opinion such a course is desirable, the Official Receiver should be required to make an application for a caveat if he has reason to believe that the debtor has committed any such act as is specified in head (a) of Section 73 of the Act.

2. Application of assets in a second or subsequent bankruptcy

If the Scheme for the automatic discharge of bankrupts within a specified period is accepted, the incidence of a second or subsequent bankruptcy of an undischarged bankrupt should be much reduced. Except in cases where a caveat has been entered against a bankrupt it will arise only where the second or subsequent bankruptcy occurs within the period specified for the automatic discharge. The creditors in the second or subsequent bankruptcy will, therefore, have given credit to a bankrupt within a relatively short time of the previous adjudication and bankruptcy proceedings. In those circumstances I do not think any amendment of Section 39 of the Act is necessary.

This will not be the case where a caveat has been entered against a bankrupt and he has not obtained his discharge within the period specified for an automatic discharge. The purpose of entering a caveat is, I understand, to protect the public and I do not think it should operate to put the creditors of a bankrupt who has a caveat entered against him in a better position than the creditors of a bankrupt who has not. Unless the law is altered, in the former case the interest of creditors in after acquired property would continue until the bankrupt obtained his discharge, if ever, whereas in the latter case the interest of the creditors in such property would cease, at the latest, at the end of the specified period.

I suggest, therefore, that the after acquired property available to the creditors of a bankrupt who does not obtain his discharge within the period specified for an automatic discharge should be limited to property acquired by the bankrupt within that period.

3. The desirability of increasing the monetary limits prescribed by the Bankruptcy Acts

The Everashed Committee on Supreme Court Practice and Procedure recommended that the figure applicable to executions in the High Court, executions in the County Court, bankruptcy proceedings and distress should be the same, and they further recommended that the figure should be £20.

Paragraph 410 of the Report is as follows:-

"410. We are in agreement with that Committee (i.e. the Committee on County Court Procedure) that, in view of the fall in the value of money, the figure of £5 should be substantially raised. It seems to us desirable that whatever figure is taken the same figure should be applicable to executions in the High Court, executions in the County Court, bankruptcy proceedings and distress. Having carefully considered the matter, we recommend that the figure for all these purposes should now be £20. We have, however, also considered the fact that any sum of money fixed by Parliament tends, having regard to the continual tendency of money to depreciate in reference to goods, to become out of date, and that a considerable time usually elapses before legislative time can be found to correct the anomaly by statute. We therefore recommend that the figure for all the above purposes should be £20 or such other figure as the Board of Trade may from time to time fix by regulation."

The Administration of Justice Bill contains provision to give effect to those recommendations in relation to matters other than bankruptcy proceedings, except that the figure may be increased by order of the Lord Chancellor and not of the Board of Trade. The figures in the Bankruptcy Act have remained unchanged since 1883 but, whether increased or not, it is suggested that effect should be given to the Everashed Report and the Board of Trade be given power to increase the figures by order. If the figure of £20 in Section 38(2) of the Bankruptcy Act is increased and the provisions of the Administration of Justice Bill referred to become law, the Lord Chancellor may well make an Order increasing the figure for matters other than bankruptcy to bring it into line.

4. Vesting of after acquired property in the Trustee

I agree that it would be advisable to amend the Act to provide that after acquired property of the bankrupt should only vest in the trustee if claimed by him.

Section 54 of the Act enables the trustee to disclaim onerous property and any person injured thereby may prove in the bankruptcy as a creditor in respect of the injury, but these provisions, as regards after acquired property, may not be in many cases of much assistance to the person injured since there may have been a substantial or complete distribution of the assets before he has an opportunity of proving in respect of the injury.

Before the decision in re Pascoe (1944) Ch.219 it was, I understand, considered to be the law that after acquired property did not automatically vest absolutely in the trustee and this view did not cause any difficulties. The amendment would not appear to injure the rights of any person.

5. Appointment of Official Receiver as Trustee in a non-summary case

I can see no reason why the creditors should not be able to appoint the Official Receiver as Trustee in a non-summary case and I think the Act should be amended to allow them to do so.

The Companies Act, 1948, does not limit the appointment of the Official Receiver as liquidator of a company to any particular class of case.

6. Conclusion of Bankruptcy where Debts are paid in full with statutory interest

Where the trustee has paid the debts in full together with statutory interest, costs, charges and expenses I think the debtor should be entitled to have the bankruptcy annulled and the surplus, if any, automatically revested in him.

This might be achieved if (a) the trustee were required to report to the Court, within a specified time, when he has made such payments, (b) the Court, on being satisfied of the accuracy of the report were required to make an Order annulling the adjudication and (c) on the making of such an Order any surplus assets were to revest in the bankrupt.

7. The enlargement of the provisions of Section 51 of the Act to cover all kinds of earnings including the wages of workmen

Although, in theory, it seems right that the provisions of Section 51 should be extended so that not only part of pay or salary but also part of all other kinds of earnings should be available for distribution among creditors, in practice, such an extension would be unlikely to be workable. Unless there is some real stability of earnings it is difficult to see how a court can make an effective order. A workman or non-salaried man can alter his earnings almost at will, or indeed, cease to have any earnings at all, so that an order made by a court one day may be quite unrealistic the next. The possible difficulties were referred to in the judgments in *Ex Parte Benwell In re Hutton* 14 Q.B.D.; in particular in the judgment of Cotton L.J. at p.308 where he says "In my opinion the Court cannot under Section 90 [Bankruptcy Act, 1869] deal with the capacity which a man has to earn money by the exercise of his personal skill. It is impossible that any definite part of his earnings could be set aside. All that the Court could do would be to order that the excess of his income above a certain fixed amount should be set aside, and paid to the trustee. But how could the Court force the bankrupt to go on working? In my opinion Section 90 points to some definite annual amount which is coming to the bankrupt, and in such a case a part of it can be set aside for the benefit of his creditors".

8. Institution of proceedings for offences under the Acts

I have had an opportunity of reading the memorandum by the Director of Public Prosecutions and I agree with his views.

9. Control of a trustee under a Deed of Arrangement

Under Section 16 of the Deeds of Arrangement Act, 1914, the Court may order the payment into Court of monies representing unclaimed dividends and undistributed funds in the hands of the trustee or under his control at any time after the expiration of two years from the date of the registration of the Deed.

Under Section 153 of the Bankruptcy Act, 1914, a trustee in bankruptcy and under Section 343 of the Companies Act, 1948, a liquidator, is required to pay into the bankruptcy estates account and the companies liquidation account respectively any unclaimed or undistributed monies which he has had in his hands or under his control for more than six months.

It is suggested that the Deeds of Arrangement Act should be amended so that a trustee under that Act is, in this matter, in the same position as a trustee in bankruptcy or a liquidator.

Additional matter

Amendment of Section 18

It is suggested that Section 18 should be amended to make clear the meaning of the words "or pass no resolution". The meaning of these words was argued in In re Fletcher. A Debtor *Ex parte Fletcher v Official Receiver* [W.L.R. 172.], but the Master of the Rolls preferred to express no view upon the question. The material part of his judgment is as follows:-

"Second, and last, Mr. Beyfus argued that the present appeal ought in any event to be dismissed, since the case fell, in truth, within the terms of Section 18(1) of the Act. As I have earlier observed, the effect of Section 13 may be said to be that the creditors are given the choice of two alternatives, viz. (a) accepting a composition or (b) resolving that the debtor be adjudicated. The creditors are not, according to the argument, entitled to embark upon a third course, declining to accept a composition but resolving that the debtor be not adjudicated; a course which might be said to be a usurpation by the creditors of the powers and duties of the Court: See *re Thurlow*, 1895 1 Queen's Bench, 724, in this Court, at page 729, per Lord Esher, Master of the Rolls, where he said: "The administration of bankruptcy matters from beginning to end takes place under the supervision and absolute control of the Court of Bankruptcy, except so far as its powers are limited by Act of Parliament. It is not for the creditors in the case to decide how the bankruptcy law shall be administered; the Court constantly overrules their views, if it thinks they have been persuaded to agree to some course which the Court thinks an improper one". So, Mr. Beyfus argued, the words "no resolution" in the phrase in Section 18(1) "if the creditors pass no resolution" should be interpreted as equivalent to "no relevant resolution"; and the resolution passed by the creditors at the adjourned meeting, which I have quoted, was not a relevant resolution, not a resolution which it was, for the purposes of the action, competent for the creditors to pass.

Mr. Salmon conceded that some limitation must be put upon the words "no resolution". It would not be possible, he agreed, for the creditors to seek to avoid the effect of Section 18(1) by passing some purely extraneous resolution - to take the example given in the course of the argument, a resolution that Parliament be dissolved. On the other hand, if Parliament had meant that the Court's duty should arise if the creditors did not pass a resolution in favour of adjudication it would have been easy enough to say so. In the circumstances, as I have already indicated, I prefer also to express no view upon the question."

It is submitted that the arguments of Mr. Beyfus are correct and that the words mean that the creditors have passed no resolution either

- (a) accepting a proposal for a composition or scheme of arrangement,
- or
- (b) that the Debtor shall be adjudged bankrupt.

29th March, 1956.

LETTER AND MEMORANDUM RECEIVED FROM
MR. LESLIE WILLIAM MELVILLE

Briar Bank,
Vicarage Lane,
CAPSEL,
Dorking,
Surrey.

19th April, 1956.

Board of Trade
Bankruptcy Department.

Dear Sirs,

I enclose memorandum on the Law of Bankruptcy as mentioned in previous correspondence. If I have not been sufficiently specific, or if you wish me to develop further any point made, please let me know.

Some of the points discussed in this memorandum are more fully treated, as to the existing law, in the following articles that I have had published:

Disclaimer of Contracts in Bankruptcy	(1952)	15 M.L.R.	28
Earnings of an undischarged bankrupt	(1948)	205 L.T.	127, 158
Acting for a potential bankrupt	(1948)	206 L.T.	210
Operative point for reputed ownership	(1952)	213 L.T.	72
Recent cases in bankruptcy	(1954)	218 L.T.	212
Re a debtor	(1952)	102 L.J.	171
ditto	"	"	5
ditto	(1953)	103 L.J.	54
Bankruptcy and contracts	(1953)	103 L.J.	212

Yours faithfully,

(Sgd.) L.W. Melville.

MEMORANDUM ON THE LAW OF BANKRUPTCY
Submitted by L. W. Melville

1. In making suggestions for the amendment of the law of bankruptcy, I have taken the view that the rights of creditors ought not in general to be superior to third parties' rights (except in rare cases), and ought in general to be narrowed down. For although it is the rule that a trustee in bankruptcy is only in the position of a volunteer, and takes property subject to outstanding rights, there are cases where the trustee has a higher title than the bankrupt had. The reason for suggesting that these exceptions ought to be severely limited, is that I assume that too ready credit facilities helps to precipitate the less cautious person into bankruptcy, and helps to produce an inflationary situation. Just as the infant is protected by depriving his creditor of the right to sue him, thereby making it difficult for an infant to get credit, so the individual trader or other person living on credit will be protected from obtaining an excessive credit beyond what his circumstances delineate as prudent by the knowledge in the creditors that, should he become bankrupt,

the trustee in bankruptcy's right to recover property parted with is limited. I have also taken the view that the law should tend on the one hand to make it not easy to drive a person into bankruptcy, and on the other hand should make it comparatively easy for a person to get his discharge, and to get it fairly soon after adjudication.

2. Where appropriate I make reference to American Law, because I find that in that country the law of bankruptcy has received much attention over the years since its basic Act in 1898. Since that Act some 60 Acts of Parliament by way of amendment have been passed (some of a minor nature it is true) of which the most important is the Chandler Act of 1938, containing some 500 sections or so (the fact that the last section is numbered 755 is deceptive since the clauses are divided into groups, but between the groups spaces are left in the numbering to allow of additions). The bulkiness of American law springs partly from the fact that it covers corporations as well as individuals, and partly from the fact that there are subsidiary sections dealing with special types of bankruptcy such as compositions, wage earners' plans, real property arrangements and the like.

ACTS OF BANKRUPTCY

3. Although acts of bankruptcy ought not to be multiplied it would seem logical that where a particular act indicating the probability of insolvency is made an act of bankruptcy, then any other act of analogous nature should also be an act of bankruptcy, otherwise the question whether a man may be made bankrupt depends on the chance what sort of act he commits; no doubt an insolvent person will in due course commit any recognised act of bankruptcy, but if proceedings are to be brought surely the sooner they are brought the better. In English law we have, in 8 paragraphs of the Act, some 10 to 13 (the number depending on how one subdivides the various provisions) acts of bankruptcy. In American law the acts of bankruptcy are set out in 6 clauses, but the latter cover a wider field than in English law except that "keeping house" and the other acts of bankruptcy by way of avoiding creditors are omitted. In principle, acts of bankruptcy fall into three classes: (1) Allowing a creditor to be in a position to obtain a charge by legal proceedings over one's property: in English law this includes levy of execution, and issuing a bankruptcy notice, whilst in America it now extends to levy of distraint. (2) Admissions of financial embarrassment covering filing one's own petition or declaration of inability to pay, notice of suspension of payment, avoiding creditors, and assigning property for the benefit of creditors generally. (3) Fraudulently making away with property.

English law lacks as acts of bankruptcy (a) levy of distress (b) debtor concealing, removing or permitting to be concealed or removed any part of his property with intent to hinder, delay or defraud his creditors (c) while insolvent or unable to pay his debts as they fall due, procuring, permitting or suffering voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property (d) admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt. It is submitted that these acts might well be added to English law, whilst some existing acts of bankruptcy might be dropped as obsolete. Whether they are obsolete, I am not in a position to say, but information could no doubt be obtained how frequently petitions are based on "keeping house", notice of suspension of payments of debts, and filing declaration of inability to pay.

LEVY OF EXECUTION

4. Section 40 of the Act is notoriously unsatisfactory because it does not make clear whether it applies to executions levied at any time, and if not at what time. In the case of Re Andrew (1937) Ch 122 the Court of Appeal reviewed the position and held that it applied only to executions outstanding at the date of the receiving order, or of notice of an act of bankruptcy. Even this clarification does not leave the position very satisfactory, because it means that a creditor who levies

execution just before the receiving order and without notice of an act of bankruptcy may retain his proceeds in full (Re Love (1952) Ch 138). Furthermore, even in the working of the section as it stands, an arbitrary result occurs in cases like George v Thompson's Trustees (1949) 1 All E.R. 554 where a creditor who had issued a garnishee summons and obtained an order absolute, and the court had received the money, did not get paid by the odd circumstance that the Court had not sufficient cash in the till on the day when he called for payment, and when he called next time they could not legally pay him because a receiving order had in the meantime been made. See also Re Lurkovic (1954) 1 W.L.R. 1234.

5. It is submitted that the section in question should be re-drafted to express the law more satisfactorily. Two lines of development are possible: either to retain the existing provisions but in clearer terminology, or to adopt a provision on the lines of the principle of relation-back whereby executions levied within three months, or other suitable period, of the presentation of the petition should be avoided. The latter is the American practice, but it should be added that relation-back in that system does not extend, as a general principle, to anything prior to the petition, (a point developed below) and this provision covers the point that an execution is, in a sense, a preference of one creditor over the others.

6. If the existing system is to be retained I suggest the clause should be on the following lines:

s.40(1) Where a creditor has issued execution against the goods or lands of a debtor or has attached any debt due to him, and the execution or attachment is outstanding at the date of the receiving order or at the date when the creditor has notice of the presentation of any bankruptcy petition by or against the debtor, or notice of the commission by the debtor of any available act of bankruptcy, the execution or attachment shall be withdrawn so that no further monies may be obtained by or on behalf of the creditor under such process, but monies already obtained may be retained.

(2) Where under an execution or attachment as aforesaid the court or a sheriff or other officer has received monies prior to the receiving order and without notice by the creditor of a petition in bankruptcy or act of bankruptcy he shall hold such monies on behalf of the creditor notwithstanding that before payment to the creditor a receiving order is made, or the creditor has notice of a bankruptcy petition or an available act of bankruptcy and he shall pay over such monies to the creditor.

(3) An execution levied by seizure and sale on the goods of a debtor or an execution in which the sheriff retains possession of the goods of a debtor for more than 21 days after levy, is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy.

With regard to the last clause the Act omits levies of execution where the sheriff holds them for more than 21 days, and as there seems no good reason for discriminating between the two types of levy, I have added this.

7. I should prefer to see an entirely different clause in which executions within three or four months prior to the petition were avoided. Perhaps s.40 meant that to be the case. So far as fraudulent preferences are concerned the present law is that they may be avoided up to 6 months prior to the petition, and it is hard to see why a creditor who has levied execution should retain his gains, whilst one who has received payment without such proceedings, but otherwise out of turn, should be required to yield up the benefit. The relevant provision in American law is that in s.67 of the Act as amended by Public Law 456 (82nd congress) s.21, viz: "Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process or proceedings within four

months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought or permitted in fraud of the provisions of this Act. Provided however that if such person is not finally adjudged bankrupt in any proceeding under this Act and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified or avoided" There are further subparagraphs which I need not set out here.

8. "Insolvency" in American law is limited to meaning where on a fair valuation a debtor's assets are less than his obligations. To extend it to cover a case where a debtor cannot meet his obligations as they fall due would be to extend it to too many people in times when money is scarce or there is any form of panic so that creditors send in their bills earlier than they otherwise would do. I mention this because it will be noticed that s.67 only refers to insolvency, whereas section 3(a) of the American Bankruptcy Act setting out the Acts of bankruptcy refers, when dealing with appointment of receivers as an act of bankruptcy, both to insolvency and to inability to meet liabilities falling due.

DISCHARGE OF BANKRUPTS

9. The grant of a discharge in bankruptcy is a concession made by the community against the creditors in the interests of the community and as a matter of expediency. It is not an essential feature of bankruptcy law and did not appear in England until 1705 (4 Anne c.17). Although it has become a recognised feature of modern bankruptcy law because it is in the interests of the community that insolvent debtors should be allowed a fresh start, and the sooner the better, nevertheless there is a danger that a man might become "bankruptcy minded" and take risks in the knowledge that if things go wrong he can always go bankrupt and then persuade the court that it was bad luck so as to get a discharge. These points are largely taken care of in s.26 of the Bankruptcy Act 1914 whereby a discharge may be refused or suspended in suitable cases. Might it not be better if English law "went the whole hog" and granted a discharge, in cases where the debtor is honest, automatically on adjudication, and at the same time, not taking his after-acquired property, but allowing it to form the nucleus of the new estate?

10. The latter is American practise. Originally, that is to say in 1898, a debtor had to apply for his discharge within 12 months of adjudication otherwise he lost the right to apply, and presumably could then only annul by paying in full. But since 1938, under the Chandler Act, it was provided (by s.14) as follows: "The adjudication of any person, except a corporation, shall operate as an application for a discharge: Provided, That the bankrupt may, before the hearing on such application, waive by writing filed with the court, his right to a discharge" There is much more which I need not set out here, and there is some amendment by Public Law 456 - 82d congress (approved July 7, 1952). It is also part of the law in America that after acquired property does not vest in the trustee in bankruptcy but goes to the debtor as his new estate.

11. With some diffidence the writer would like to make a novel suggestion regarding discharge, admitting at the outset that it is not likely to operate except in the rarest of cases, but as it does not alter the law, but merely adds a facility which the discharged debtor can take advantage of or not, might well be tried out experimentally. The idea is to show that the attitude of the law is that a debtor, whilst being granted his discharge, is put upon his mettle to redeem his bankruptcy by coming back to the court in due course of time with the unpaid balance and in return being granted an annulment. This may sound very naive, but it is admitted that few would have the determination or the sense of duty to operate it. To make it more practical I am suggesting that redemption be allowed without payment in full with the consent of the creditors and the Court. Nevertheless it would show the court's attitude, and might well have a sound psychological effect, since it would be part of the scheme that a

discharged debtor be made aware of his duty by having it endorsed on the document of discharge, setting out the provisions suggested. It would have the advantage of (a) removing disqualification for holding public office where a certificate of misfortune was not obtained and 5 years has not expired (b) rehabilitating the debtor with his old creditors which would be valuable where he stays in the same line of business (c) give him something to work for which will show him to be a man of honour (d) allow him to do it through the court, publicly if necessary, and provide for suitable advertisements, (e) have an ante-inflationary effect by requiring him to save money.

12. It may be that this can be done under the existing law concerning annulment, but the writer has seen no mention of it. It is suggested that special provision be made on the following lines:

Redemption Proceedings

- (1) Where a bankrupt has been granted his discharge in bankruptcy whether absolutely or conditionally, and if conditionally, whether the conditions have been fulfilled or not, he may apply to the court for an annulment of the bankruptcy by filing an application in writing for redemption and annulment.
- (2) On the filing of the application the court shall cause each of the creditors whose debts were provable in the bankruptcy to be notified of the application and shall require each such creditor to state within 30 days and in writing signed by him whether he desires to receive the balance unpaid on his claim or whether he waives payment in whole or in part, and if in part to what extent.
- (3) Interest as provided by s.33(8) or otherwise shall not be claimable under redemption proceedings.
- (4) Any promise by a creditor in the bankruptcy made to a discharged bankrupt that in redemption proceedings he would accept less than the balance unpaid, shall, if it is made in writing and signed by the creditor, be binding as between debtor and creditor even though not made for any consideration or for a past consideration, but shall not be binding on the court.
- (5) Any payment made by a discharged bankrupt to any creditor in the bankruptcy in respect of the unpaid balance or part thereof shall be taken into account in redemption proceedings, but no part of such payment shall be returnable to the debtor.
- (6) At the expiration of 30 days from the despatch of the notices under ss.(2) hereof the court shall notify the debtor of the amount required by the creditors for redemption and annulment. Where this is less than the unpaid balance, owing to the fact that any creditor is willing to accept less than he might claim, the debtor shall be notified accordingly and shall be informed that redemption requires the approval of the court in those circumstances, and he shall be informed of the date of hearing.
- (7) Creditors who fail to reply within the time allowed shall be deemed to have waived their claims, but this circumstance shall not of itself require that the redemption proceedings be approved by the court.
- (8) Where creditors waive their claims or part thereof, the order of annulment of the bankruptcy shall be granted only with the approval of the Registrar, who may require the attendance of any party, or the filing by any party of an affidavit, in any case where he thinks there may have been undue pressure against the creditor waiving as aforesaid directly or indirectly or ignorance of the facts on the part of such creditor, or there may be a collusive agreement, such attendance or affidavit being directed to negating the existence of such circumstances.

- (9) On payment by the debtor of the amount notified to him by the court, the court shall annul the bankruptcy, subject to the preceding subsection.
- (10) The calculation of the amount due from the debtor shall not include the costs of the application for redemption, but such costs shall be deducted from the amount received from the debtor prior to the declaration of the redemption dividend, such dividend to be paid within one month of the date of the expiration of the 30 days mentioned in ss.(2) or within one month of the date of any hearing of the application or of any adjournment thereof.
- (11) Any debtor against whom bankruptcy proceedings have been taken and who has been adjudged a bankrupt who pays his debts in full or otherwise obtains an annulment shall be entitled to require that the court causes to be published in the London Gazette, and, at the expense of the debtor, in such other papers as he elects, a statement to the effect that he has paid his debts to the satisfaction of the court. Any publication of such statement shall be made only with the written consent of the debtor, and in such form as he approves in writing, and shall omit any mention of bankruptcy or of the Bankruptcy Acts if the debtor so desires, but may show that the statement is issued by a Registrar of the High Court or a County Court.
- (12) On the granting of a discharge in bankruptcy the debtor shall be notified in writing of this redemption procedure and shall be informed that it is his duty to endeavour to make application therefor.
13. The extension of annulment after discharge so as to allow creditors to apply to the court for the debtor to show cause why he should not redeem is another possibility, but I do not advocate it, except possibly on the basis that the whole of the expense of the proceedings and the onus of proof be on the creditor. It may be recalled however, that Lord Mansfield in *Hawkes v Saunders* (1782) 1 Cowp. 289 took the view that a discharged bankrupt who promised to pay his old creditors could be sued by them on such promise even though made without consideration. That view was expressed in pursuance of that great Judge's view that moral obligation was sufficient to support a promise. That provides a further possibility: that a discharged debtor's promise to pay shall be declared to be enforceable without consideration. It is enforceable with consideration even when made before discharge (*Wild v Tucker*) (1914) 3 K.B. 36).

CERTIFICATE OF MISFORTUNE

14. No provision is made in s.59 of the Local Government Act 1933 for the grant of a certificate of misfortune to reduce the 5 year disqualification period where the debts are not paid in full. Is this an omission which has been overlooked? If so, it might be remedied.

RELATION BACK OF TITLE OF TRUSTEE

15. The doctrine of relation-back is designed to protect creditors from the temptation which presents itself to the debtor to make away with his property to relatives and friends when he sees insolvency developing. Some such provision has existed almost continually in bankruptcy history, but there is always the question what form it should take. In fact one of the most suitable provisions exists independently of bankruptcy namely the old provision in the Statute 13 Eliz.05 concerning fraudulent conveyances and now s.172 of the Law of Property Act, 1925, of which a Trustee in bankruptcy may take advantage on behalf of the creditors. At least it is assumed that he may though there is no provision to that effect, and there might, with advantage, be a provision which expressly states that power. I propose to show that the English system under the provisions of ss.37,38 of the Bankruptcy Act is unsatisfactory and unnecessary. There are two aspects of this doctrine: (1) it makes it difficult for a debtor to continue in business once he has committed an act of bankruptcy of

which the person he is dealing with is aware, and so tends to drive the debtor into bankruptcy where he might otherwise have avoided it, and (2) by declaring transactions which contravene the provisions to be void, it may strike at an innocent purchaser, where, for example the purchaser is in fact a sub-purchaser (Re Gunsbourey (1920) 2 K.B. 426). It is possible under a case like Re Gunsbourey for a person who has paid full value and bought in good faith, who perhaps has never heard of the bankrupt, to find that he must yield up the property. True he has, presumably, a right to claim recovery of the purchase money from the vendor on the basis of failure of consideration (Rowland v Divall (1923) 2 K.B. 500) but this may not be worth much in some cases. Another difficulty is the question of agents handling money or property of the debtor with notice of an act of bankruptcy. If they have such notice, and bankruptcy supervenes on a petition presented within three months, must they account for the money when they have merely passed it on? Lord Mansfield in Coles v Wright (1811) 4 Taunt. 198 said that the doctrine would not apply because it was a harsh doctrine and ought not to be extended, but that was a dictum. Suppose a solicitor for a creditor receives a cheque for his client made payable to the client for part of the debt sent by the debtor, is he accountable? Such an agent has a right of subrogation to the rights of the trustee and may maintain an action against any person who received it from him where that person has notice, but would the solicitor's notice be imputed to his own client so as to enable the solicitor to reclaim the money from his client? Again, can a solicitor receive money to defend a bankruptcy petition? The law is not clear for the view expressed in Re Sinclair ex parte Payne (1885) 15 Q.B.D. 616 was detracted from in Re Spackman (1890) 24 Q.B.D. at 732-3 by the same judge that decided Re Sinclair. Can the Legal Aid Fund require a contribution from a legally aided debtor who wishes to have legal aid to defend a petition when they have notice of an act of bankruptcy? There is no provision in the Legal Aid Acts to cover this problem.

16. These problems disappear if we adopt the system which has been in force in America since 1898 with a slight subsequent modification. Originally that Act limited relation-back to the date of adjudication, and Judge Torrey in June 1897, explaining the purpose of the Act, pointed out that the uncertainty produced by knowledge of the commission of an act of bankruptcy tended to drive a person into bankruptcy. Judge Torrey was particularly concerned with the effect of the filing of a petition, but subsequent developments after the 1898 Act came into force showed that relation back could not be made to start later than the petition and the law was altered. Commenting on that we may say that where a man has committed an act of bankruptcy known to his suppliers they are likely to be chary of dealing with him anyway, whilst customers are not likely to know of the act of bankruptcy, but if they do they may be willing to take a risk if a bargain is offered. Nevertheless, the more the law attacks transactions on the eve of bankruptcy the more a man is likely to be driven to bankruptcy, and the matter can be arranged so as to protect the creditors in other ways. The real fault with relation-back is that it first shifts the onus of proof on to the third party to show that he is protected by s.45. This may not always be difficult, but the fact that the onus is shifted can create the uncertainty. It is surely enough to protect the creditors to limit the trustee's power of reclaiming former property by declaring voidable any transaction which is in fraud of the creditors. This can be done on the existing law under s.172 of the Law of Property Act, 1925, which has no time limit, so long as it is made clear that it is operable by the trustee in bankruptcy. There is also s.42 of the Bankruptcy Act, 1914. If that power is limited (except in cases of fraud) to such actions as any creditor could have brought, that helps to achieve the aim suggested in paragraph 1 above of limiting the creditors' rights, so as to discourage too easy credit.

17. The main provisions of American law are, first that relation-back extends from adjudication to the date of filing the petition initiating bankruptcy proceedings, and secondly power for the trustee to attack earlier transactions on the following lines:

(a) Under s.70a the trustee's title to the bankrupt's property extends inter alia to "all property transferred by him in fraud of his creditors". This is similar to our s.172 L.P.A. and, like that section, specifies no time limit.

(b) Under s.60 a fraudulent preference made within 4 months prior to the petition may be avoided. In England the period is longer - 6 months under the Companies Act 1947, s.115.

(c) Under s.67 any charge by way of execution within 4 months before the filing of the petition is deemed null and void as mentioned above in paragraph 7.

(d) Under s.70e the Trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide purchaser for value prior to the date of adjudication. This is similar to (a) above except that it is not concerned with fraud only, and is limited to what a creditor could have done by way of avoidance whereas (a) gives the trustee a higher title. It is believed that English law as it exists allows an action of this type, but there is no express provision to that effect.

Thus English law already contains all that is necessary to protect the creditors' interests, and need not continue with the harsh doctrine of relation-back, which is reminiscent of the Bankruptcy Act of 1542 when bankrupts were regarded as criminals.

18. By removing any defect to a transaction on account of knowledge of an act of bankruptcy we should dispose of the difficulties mentioned above in paragraph 15, except that this would leave the problems open as regards any transaction after petition. Provision should therefore be made for a debtor to make contracts for the necessities of life so as to enable the creditors to claim a reasonable price in full, and not a dividend, just as infants, lunatics and drunks may make such contracts. It should be made clear that this includes engaging a solicitor to defend the petition, or accepting an offer from a Legal Aid Committee on the basis of being liable for a contribution. It should be made clear that if such transactions are entered into and paid for in cash, the money may be retained by the recipient notwithstanding notice of a bankruptcy petition.

19. Another disadvantage of relation-back is also removed by adoption of the above suggestions. As the rule stands at the moment relation back extends to the first act of bankruptcy within three months prior to the petition. This may operate over the full three months or may not operate at all depending on what acts of bankruptcy have been committed. Thus if the act of bankruptcy is that of keeping house then because it is a continuing act it can extend over the whole three months, and the creditors get the benefit of the doctrine to the maximum. But if a man files his own petition and has not committed any earlier act of bankruptcy, and if he is adjudicated bankrupt the same day, as he may be, then the doctrine does not operate earlier than the petition, so here the creditors only get the advantage of the other sections. This latter case is what is not being advocated, and it will be appreciated that it is not really novel, but is what in fact happens in the latter type of case.

20. Attention should also be drawn to a contradiction in the Act between the provisions of sections 45 and 46 which are concerned with protecting third parties from the operation of relation back. Section 46 is meant to cover the case where a Trustee under a Deed of Arrangement proceeds to get in the assets prior to the expiration of three months from the execution of the Deed. Since any person paying money to him of necessity has notice of an act of bankruptcy, section 45 protects him by providing that he shall get a good discharge. But it is drawn in too wide terms, and conflicts with s.45 which says that one only gets a good

discharge if one has no notice of an act of bankruptcy, and this matter should be clarified. It will not matter if the suggestions made above are adopted.

21. I recommend that the law be altered on the lines of paragraph 17 above, but I do not here set out any suggested sections because the matter would need careful drafting and study of American law, and this would unduly delay the submission of this memorandum.

BANKRUPT'S PERSONAL RIGHTS

22. The law concerning the rights of the bankrupt that do not pass to the trustee works very unevenly. For example it has been held that if a bankrupt is wrongfully dismissed the right of action vests in the trustee if the dismissal was before bankruptcy, but in the bankrupt if it was after bankruptcy. Since it is the same kind of action in each case the distinction seems hard to justify.

23. More important under the present law is the question of the earnings of an undischarged bankrupt and the right of the trustee to claim a portion of them for the creditors. If a man is employed under a contract of service, or is otherwise in receipt of a regular income under a binding legal obligation the trustee can make a claim (whether the income vests in him or not he must make the claim). But if the bankrupt is self-employed it has been held that the trustee cannot get an order because, said the court, a man need only stop working after he has earned the minimum above which the order would start to operate, and the court's order is nullified. The result is that in Exp Benwell Re Hutton 14 Q.B.D. 301 a man earning £4000 a year could not be made to contribute. My comment on this is that today the income tax people would see to it that he paid income tax, and if they can do that the court can also make an order which would be effective by requiring him to pay over, not the whole of anything earned above a set minimum, but a proportion of it, on the same lines as income tax is computed. An amending section should make it clear that the court has power to make an order requiring so much in the pound above a certain minimum (after paying income tax) to be paid to the trustee.

24. I should however, prefer to see the abolition of after-acquired property vesting in the trustee, as suggested under paragraph 10, and with it, the power to apply for orders against income, except that the latter may be retained if conditional discharges are retained, as part of the condition for the discharge.

EXEMPTIONS

25. The exemption of Tools of trade etc. at a figure of £20 is wholly unrealistic today, particularly now that power tools are often used by the humblest of workmen, and a much higher figure, with perhaps a discretionary power in the court as to what it should be in any particular case, would be well worth trying out. If the maximum were £100 it would hardly meet the case in some circumstances when one considers that bedding and wearing apparel of oneself and one's family are also included. If a workman is given priority in the bankruptcy of his employer up to £200 wages, why should not the employer himself retain £200 of tools, furniture, etc.?

26. In some States of America the exemptions extend to the homestead, up to a specified maximum value, and in some States to a motor-car. The latter provision is essentially American because of the paucity of public transport as compared with England, and would not be justified here. But the extension of exemption to the homestead, by recognising the modern tendency to purchase rather than rent a house, would add to the restriction of credit. It would, however, have to apply in all judicial executions. A more practical point is made below under which the home may be saved by re-arranging the mortgage. This scheme for protecting the homestead is not merely for the benefit of such persons as

farmers who are necessarily tied to a particular piece of land, since in America a farmer cannot be made bankrupt except on his own petition (see s.75 of the Act).

REPUTED OWNERSHIP

27. The growth of hire-purchase has probably overshadowed the importance of the doctrine of reputed ownership, for what creditor, looking at the debtor's circumstances, can safely assume that he owns the goods in his possession? If he cannot make the assumption there is no reputed ownership.

There is no doctrine of reputed ownership as such in America but that is because hire purchase and credit sales (called conditional contracts or bailment-leases) have to be recorded in the majority if not all the States. But it has been laid down in that country that the question whether a transaction is one of bailment, consignment, etc. or one where title has passed does not depend on the parties designation of the transaction, but on what it appears to be after a consideration of all the facts. The cases mainly concern unrecorded agreements (e.g. Finance Guaratee Co. of Baltimore v. Stitt (1927) 21 Fed (2d) 718; Re Rainey (1929) 31 Fed (2d) 197).

28. But assuming that the doctrine may still operate, it will be shown that its operation can be arbitrary. It is supposed to be based on the proposition that a person who appears to be better off than he is because he has possession of the property of others in the way of his trade, might obtain "false credit", and to compensate for this the trustee has the right to claim the goods of such third party (Re Fox (1948) 1 Ch. 407). If the law stated the doctrine in those terms i.e. that the trustee could claim such property where the debtor had in fact obtained false credit from a creditor of the bankrupt who has remained unpaid, the rule might well be justified. In an American publication (Uniform Laws Annotated Vol.2 p.84) the opinion is expressed that to draw a distinction between creditors who actually relied on the goods, those who relied on the buyer's general appearance, and those who would have extended credit anyway, is to draw too fine a distinction. It is however purely a matter of evidence, and the court could use its discretion in assessing the evidence.

29. The arbitrariness of the operation of reputed ownership as at present enacted arises from the circumstances that reputation of ownership is judged at the date of the commencement of the bankruptcy i.e. the first act of bankruptcy committed within three months prior to the presentation of the petition, in the same way that relation-back is calculated. In the first place this is not a fixed date, for if a date is fixed by the trustee, he may later discover an earlier act of bankruptcy and a new date has then to be taken. What happens if property alleged to be in reputed ownership has been taken by the trustee, and then a new date is fixed, and at that date it appears that the goods were not in reputed ownership, is not known. But ignoring that complication let us consider the ordinary case where goods were in the reputed ownership at the date of the commencement of the bankruptcy. False credit may not have been given at all yet the goods may be claimed. But suppose the goods were taken out of reputed ownership the day before the commencement of the bankruptcy, by the true owner withdrawing his consent, the goods cannot be claimed even though false credit was given, and this is so even though the debtor continues to possess the goods, if the true owner made a bona fide demand for their return which was unsuccessful. Again if goods come into the reputed ownership of the debtor the day after the commencement of the bankruptcy, and false credit is given by a person who did not have notice of the act of bankruptcy, he may prove in the bankruptcy, but the trustee cannot claim the goods. All this arbitrariness springs from the rule that the date of the commencement of the bankruptcy is the date chosen to judge the matter, instead of taking the date when any credit was given. It is submitted that it is just as easy to judge reputed ownership on any date when credit was given as on the date of the commencement of the bankruptcy. Whether one should require that some

creditor should show that he in fact gave credit on the faith of the ownership by the debtor of the goods is an additional point. If this is thought to be too difficult it may be omitted. It is submitted that a suitable amendment should be made to alter the date at which reputed ownership is judged on the lines of this paragraph.

30. A very anomalous application of reputed ownership is to book debts.

If A, the debtor, charges his book debts owing to him from X, Y, and Z in favour of B who advances money on the security of the debts, or purchases them outright, the book debts are nevertheless deemed to be in A's reputed ownership. Let us first ask what trade creditors of A will know of the book debts, and grant credit, false credit if they have been effectively assigned, on the faith of them? In many cases none. But suppose some creditor, C, does know of the existence of the book debts, and has some idea of their value, but does not know that they have been charged to B (assignments of book debts do not need to be registered as bills of sale where the assignment specifies the debts, nor in certain other cases) and C grants credit to A. Now if B, the assignee, gives notice in writing of the assignment to X, Y and Z then the book debts cease to be in the reputed ownership of A. This is a most extraordinary rule, for the person who ought to be notified if false credit is to be prevented is C not X, Y or Z!

Under American law assignments of book debts are effective even though no notice is given to the debtors; nor are they caught by the provision that they are in fraud of the creditors, for it is not legally fraudulent if not actually fraudulent, provided that the parties have no knowledge of the bankrupt's insolvency (See Remington on Bankruptcy (10 volumes) Vol.4 para. 1417).

SPENDING TRUSTS

31. Attempts to settle property in such a way that it cannot be claimed by the trustee in bankruptcy of the beneficiary, sometimes called spendthrift trusts, though of course, the beneficiary may be a miser, have been made from time to time, and there are still ways in which this object can be achieved, though if the beneficiary receives more than is necessary for his maintenance out of the income there is the right for the trustee to claim the surplus. In so far as capital can be kept from the trustee in bankruptcy we have a situation the reverse of reputed ownership, though it differs from that doctrine in that the apparent creditworthiness will not spring from possession of goods but from the effects of unearned income. Should not the law be made uniform for all debtors whether they have the advantage of settled property or not, by allowing the trustee to claim the capital or such interest as the debtor has in the capital e.g. his life interest notwithstanding any form of settlement?

32. The commonest form of settlement which protects from bankruptcy of the beneficiary is a settlement by another of his property in favour of the person who becomes the bankrupt "until bankruptcy", or settlement on protective trust giving the trustees an absolute discretion what income they pay to the beneficiary. In the latter case the beneficiary is said to have no interest in the property because he is in the hands of the trustees, though conceivably he may be a trustee himself, and the other trustee may be a close relative or acquaintance. Since alteration of the law on this point might be thought to be too revolutionary, there should at least be provision for the public recording of such settlements so as to negative false credit.

33. It is said that a man cannot settle his own property on himself so as to defeat his trustee in bankruptcy, but it seems that even this may be circumvented in various ways, though such arrangements have their own disadvantages. In the first place there is the discretionary trust which is apparently applicable. Secondly, he may settle his own property with a gift over to a particular person in the event of a voluntary assignment by him of his interest, and if he sees bankruptcy looming up and makes the assignment before the commencement of the bankruptcy then the gift over

takes effect so that the debtor has lost any interest in the property, though the assignee may well be his wife (Brook v Pearson (1859) 27 Beav. 181). This has the disadvantage that if he avoids bankruptcy the gift over has operated and he cannot get the property back, except by consent. Further, a gift over to operate on an involuntary assignment or charge e.g. by way of legal process can operate to defeat the trustee in bankruptcy (Re Detmold (1889) 40 Ch. D. 585). Such settlements should be invalid as against a trustee in bankruptcy unless registered publicly, or possibly should be invalid in any event.

FRAUDULENT PREFERENCE

34. According to the decisions of Re Badham 10 Mor. 252, and Re Seymour (1937) Ch. 668, a fraudulent preference made after the petition cannot be avoided by the trustee, as it may be protected by s.45. This is anomalous, and is due to the unfortunate wording of the section, and the appropriate amendment should be made to make voidable any fraudulent preference by a person adjudged a bankrupt at whatever time it is made subject to the limitation that one does not take account of payments made more than six months prior to the presentation of the petition on which bankruptcy ensues.

EFFECT OF BANKRUPTCY ON CONTRACTS REQUIRING COMPLETION BY GRANT ETC.

35. Two cases of difficulty arise which are connected partly with what has been said above concerning relation-back. The problem is this: suppose a debtor has entered into a contract for, say, the sale or purchase of land and, after contract but before completion he commits an act of bankruptcy, or the other party receives notice for the first time of an act of bankruptcy which had been committed before contract, then completion of that contract must be held up until three months have expired without the presentation of a petition (Powell v Marshall (1899) 1 Q.B. 710; Jennings Trustee v King (1952) 2 T.L.R. 496). The reason is that though the contract is protected from relation back because of absence of notice of an act of bankruptcy, s.45 is so worded as to require absence of notice before completion of the conveyance. This may be guarded against by suitable provision in the contract as regards the innocent party's desire, if such be the case, to rescind for commission of an act of bankruptcy by the other party, as by making time of the essence of the contract. The difficulty disappears if the suggestions in paragraph 17 above be adopted, but if they are not adopted, then would it not be unobjectionable to allow completion of a protected contract notwithstanding notice of an act of bankruptcy, provided that present consideration of reasonably equivalent value passes?

DISCLAIMER OF CONTRACTS

36. The Act allows the trustee in bankruptcy to disclaim unprofitable contracts, but fails to define what is meant by "unprofitable". It was said in Re Bastable (1901) 2 K.B. 518 that a contract of sale cannot be disclaimed. It may be concluded that "unprofitable" is an unhappy expression which really means contracts the performance of which the trustee cannot satisfactorily supervise, for if he were liable, and they were completed badly, he would be exposed to an action. This would fit in fairly well with the other aspect of outstanding contracts viz. claiming specific performance against a trustee in bankruptcy of an outstanding contract uncompleted by the bankrupt. For the rule is that specific performance cannot be had where the court could not satisfactorily supervise performance. There are borderline cases where the two opposing rights may clash, and it would clarify the position if the law made clear what is meant by unprofitable, and whose right shall prevail where a third party wants specific performance and the trustee wishes to disclaim. One would think that a statutory right should over-ride the equitable claim, but it must not be overlooked that a trustee in bankruptcy takes property subject to outstanding rights.

37. It is also not clear what is meant by the words "deemed to have adopted" a contract contained in section 54(4), where a person interested in disclaimable property serves a notice on the trustee and he does not disclaim within 28 days. Does this make the trustee personally liable, if so the person in question may look to him for payment in full; or does it make the estate liable, if so, is the person in question not a priority creditor? If he is a priority creditor in what order of priority does he rank? I have discussed these and other points more fully in 15 M.L.R. 26.

ORDER OF PAYMENT OF DEBTS

38. If bankruptcy is thought of as a system whereby the assets are shared out rateably among the creditors, it has largely ceased to be true owing to the growing importance of some of the priorities. I submit that the question of priorities should be reviewed to ensure that the present arrangement is satisfactory. It may well be that there is no justification for making a change, but the fact is that there are apparently three groups of priorities, and three groups of deferred debts, making in all seven steps, each of which has to be paid in full before the next step receives any dividend. When one considers the large amounts for income tax which some bankrupts are found to be owing, it means that no one else is likely to receive a dividend. I am not suggesting that tax should not be a priority, (though possibly the whole of it need not be) because non-payment of tax affects the whole community. It seems a little surprising that a bankrupt person should owe large sums for tax, and perhaps undue prominence has been given to a few isolated cases of sudden bankruptcy, nevertheless the question of priorities is very important to the lower ranks of priority.

39. The orders of priority as I understand them are of the following nature: First there are the expenses of administration, and a number of miscellaneous cases some of which are not of general application such as the right of an apprentice to claim part of his premium back; the right of the curate of a bankrupt beneficed clergyman to claim salary up to a certain amount; funeral expenses of deceased debtor; the right of a landlord to distrain, and though he has to pay out certain priority creditors, he steps in their shoes. The Act does not make clear in what order these claims rank if they are in competition in the same estate, though of course, the curate's case is bound to be exceptional. Second there is the claim of a Friendly Society or Trustee Savings Bank against its bankrupt officer to trust monies which are not traceable. Sometimes the expenses of the trustee under a Deed of Arrangement are classed under this head, but in fact they are a first charge on the assets, and so may be regarded as external to the bankruptcy. Third there are the provisions concerning rates and taxes, wages of clerks, servants, workmen or labourers, and workmen's compensation or National Insurance contributions of a bankrupt employer. Fourth come to the bulk of the creditors having no special priority. Fifth are the first deferred debts covering such cases as money lent by one spouse to another for trade or business purposes, loans to traders where the interest is to vary with the profits, goodwill paid out of profits, and interest in excess of 3%. Sixth is interest on all debts at 4% from the date of the receiving order. Seventh are claims by beneficiaries under a covenant in a settlement avoided under s.42(2). As to these last three categories see Re a Dr. (1947) 1 Ch. 313.

40. I particularly draw attention to the position of the landlord. It is somewhat complex because apparently the landlord may be affected both by the provisions of section 35(1) which limits the amount of rent which he may retain as against the trustee in bankruptcy to six months, if the distress should turn out to have been during the period of relation back (incidentally the section allows the landlord to distrain notwithstanding notice of an act of bankruptcy, a point recommended above to be of general application) and also to section 33(4) requiring the landlord to pay out of any proceeds of distress, the priority creditors, but giving him their priority in that case. It would help to clarify the

position if the Act made clear that both sections may operate at the same time (this perhaps is not very important, because there seems no reason to reject it, but it is not stated) and also to make clear what is meant by "priority creditors" since there is more than one category, and the Act does not state which categories are intended.

THE "COMMON LAW" OF BANKRUPTCY

41. There are a number of decisions of the courts laying down rules applicable to bankruptcy not merely as interpretations of the Act, but as additional rules, so as to form a type of judicial legislation. Should they not be given statutory effect, or statutorily negatived if not approved? Three not unimportant rules are:

(1) The rule that a debt to support a creditor's petition must be liquidated both at the date of the presentation of the petition, and also at the date of the act of bankruptcy (Re a Dr. (1954) 1 W.L.R. 1190 C.A. confirming earlier cases).

(2) The rule that where goods of a third party are in the reputed ownership of the bankrupt the true owner may prove in the bankruptcy and that the law does not confiscate his goods without remedy (Re Button exp Haviside (1907) 2 K.B. 180).

(3) The rule in Exp. Waring (1815) 19 Vesey 345 and Re Richardson exp Smart L.R. 8 Ch 220 that where securities are deposited by the drawer of a bill of exchange with the acceptor to cover the acceptor's liability, and both drawer and acceptor become bankrupt before maturity of the bill neither are entitled to the securities, but the holder of the bill may instead claim them; or where the drawee does not accept but gets an accommodation acceptance. In either case there must be a double right of proof by the holder of the bill against drawer and acceptor.

RE-ARRANGEMENTS OF LIABILITY WITHOUT LIQUIDATION

42. There seems to be a gap in our debtor law which was probably meant to be filled by the composition or scheme of arrangement under ss. 16 and 21. For many years bankruptcy applied only to traders, and one thinks mainly of the trader when discussing bankruptcy. The statistics provided by the recent bankruptcy report show that traders are the main concern of bankruptcy. But with the extension of bankruptcy to everyone, one has got to consider whether special schemes are not required for the wage-earner, schemes which could also be taken advantage of by anyone whose bankruptcy arises out of his personal circumstances rather than business.

43. This gap is partly filled by the Deed of Arrangement, and one notices that many of these are filed each year. But the trustee under the Deed of Arrangement has only the benefit of a cessio bonorum and must accept what the debtor gives him. Since the creditors have to agree presumably this is not an unsatisfactory arrangement. Nevertheless, under the Bankruptcy Act scheme of arrangement it is provided by section 16 sub-sections 17 and 18 that parts II and IV of the Act are to apply. One would think that this gives the trustee under a composition the powers of a trustee in bankruptcy to investigate previous transactions and to claim future property or earnings, but in Re Croon (1891) 1 Ch.D. 695 Kekewich, J., thought that the trustee's powers were limited by the "contract" of arrangement.

44. Would it not be to the advantage of debtors if they could submit themselves to a composition under the Bankruptcy Act under which the trustee could take future earnings of a wage-earner and apply them in reduction of indebtedness, re-arranging existing liabilities somewhat on the lines of the Liabilities (War-Time Adjustment) Act? The debtor would usually get his discharge when the arrangement was accepted, and the future payments would cease when it was completed. Re Croon (supra) does not say this cannot be done, but merely that it must be in the arrangement,

and in any event it is not a very strong case since in that composition the creditors were going to receive 20s in the £.

The American Chandler Act of 1938 is mainly concerned with this type of proceedings. So far as Chapters I to X are concerned there is little that is new since the 1898 Act. But Chapters XI to XIV and Chapter XV subsequently added, are mainly concerned with schemes to allow a debtor to remain in possession of his business or property and to re-arrange his liabilities without the stigma of bankruptcy, but under the supervision of the court and with powers in the trustee which resemble those of a trustee in bankruptcy including the useful power of disclaimer of executory contracts. The consent of the creditors is required but it is only a simple majority in number. True these provisions take the place of our Deeds of Arrangement Act, but the trustee has these additional powers, which under the Deeds of Arrangement Act he has not.

The American Act was passed it will be observed within a decade of the depression of 1929, and so is presumably based on wide experience. With the growth of hire-purchase in this country, the possibility of debtors wanting re-arrangements in times of personal or general difficulty ought to be provided for, though it is noticed from the Times for 19th April 1956 that the average hire-purchase debt per head in this country is, at the moment, estimated at £10 as against £58 for America. In any event, this type of re-arrangement is apparently possible under the existing Act if amending legislation will make clear what the powers of the trustee are meant to be, and possibly if the majority required for consent is reduced.

(Sgd.) L. W. Melville.

19th April, 1956.

FURTHER MEMORANDUM SUBMITTED
BY MR. LESLIE WILLIAM MELVILLE

45. What was said in para. 1 should not cause any practical difficulty to the person seeking proper credit facilities, because, in practice, these spring from factors other than Chattel or land security; they spring from personal acquaintance with the individual and his way of life; from knowledge of his line of business and the general economic trends in that line; from his place of business and its suitability to its intended scope, and such matters.

One has but to consider the position of the limited company and the ease with which it gets credit without creditors checking on its paid up capital.

But such restrictions on ease of getting credit, do, it is believed, influence the trader supplying the consumer for direct personal consumption, and here the suggestions made should have some influence. The field admittedly is not important on the face of it because most bankruptcies occur to traders, but these often come about, do they not, from excessive personal expenditure.

46. It is proposed to indicate some of the rules of other legal systems, apart from those of America, in this memo.

47. Acts of bankruptcy:

Under the Canadian Bankruptcy Act, 1949 (which closely follows English Law) an admission of insolvency is an act of bankruptcy: see s.20 (1)(f). So is a fraudulent removal or secreting of property (s.20 (1)(g)).

Under Australian Law (Bankruptcy Act 1924-48 as amended) an admission of insolvency is an act of bankruptcy: see S.52 (h).

Under South African Law (Act No. 24 of 1936) removal of property with intent to prejudice creditors is an act of bankruptcy (called an act of insolvency): see S.8 (d). So is an admission of insolvency though here the form is peculiar to South African law having origins traceable to the Roman Law System of cessio bonorum. See s.s.(f) and (h). A notice in writing of inability to pay is also an act of bankruptcy (s. 8 (g)).

What was said about some acts of bankruptcy being obsolete needs further explanation. It is submitted that the criterion of the utility of an act of bankruptcy is not how often it is used in a petition but the proportion of cases which result in an adjudication from any particular act of bankruptcy and how many petitions fail. At the same time where an act of bankruptcy is rarely used that may be a ground for its removal from the law.

The act of bankruptcy which, it is believed, needs re-assessment, as to its claim to remain in the Act, is the notice of suspension of payment of debts. That was a new act of bankruptcy created in 1883. See House of Commons Committee Reports for 1883 Vol. XI p. 246 and elsewhere. It was first proposed that the act of bankruptcy be "If the debtor, being a trader, suspends payment". This was later altered to its final form (p.248). An amendment to require the notice of suspension to be in writing was negatived.

It is submitted that this act of bankruptcy has caused too great a difficulty as to its true application, and that if it is to be retained the original form of an actual suspension is better, but need not be limited to traders. Then there is the question whether, if it is to be by notice, the notice must deal with the creditors as a whole which would cease to cause difficulty by such an amendment (See Re Scott (1896) 1QB 619 per Vaughan Williams and Kennedy, J.J. as they then were). The purpose of this act of bankruptcy was stated by Lord MacNaghten in Clough v Samuel (1905) AC 442, 445-6 to the effect that when notice of suspension was not an act of bankruptcy it caused unfairness (his lordship does not say to whom) because transactions continued to be entered into. Presumably the unfairness was to existing creditors because the claims increased at a higher pace than the assets. This difficulty would not exist if the suggestion in para. 15 et seq. (supra) were adopted and then the original form of this act of bankruptcy i.e. actual suspension, could be adopted.

The act of bankruptcy of keeping house is probably still useful in its aspects of departing from the country or from one's dwelling house. This appears in most other systems.

48. In Continental law it seems that acts of bankruptcy are not used and bankruptcy is based on either (a) the voluntary submission of a cessio bonorum (see Italian Civil Code pars. 1977-1986; French Code Napoleon Arts 1265. et seq. etc.), or (b) proceedings may be commenced by a creditor after suspension of payment by the debtor. (French Code de Commerce Art. 437). In Brazilian law there is a list of enabling facts something like acts of bankruptcy. Suspension apparently means actual suspension not notice of suspension (e.g. in the French Code, Art. 437 "Tout commerçant qui cesse ses paiements est en état de faillite". Faillite is a development of Cessio bonorum it appears, but may be instituted at the request of creditors. The term "banqueroute" is reserved for debtors who have been negligent or fraudulent.)

49. Discharge. Most legal systems, but particularly on the continent, divide bankrupts into three groups:

- (a) Fortuitous bankruptcies i.e. non-dishonourable
- (b) Culpable or negligent bankruptcies brought about by carelessness or extravagance.
- (c) Fraudulent bankruptcies.

Generally discharge is more difficult to obtain in (b) than (a) and in (c) than in (b), and in some systems fixed minimum periods are laid down. It will almost always be the law, where there are such periods, that after acquired property vests in the trustee. See for example the law of Argentine or Costa Rica (summarised in Martindale - Hubbell's Law Directory).

English law, in effect, recognises these three divisions in its special rules concerning discharge in S.26, though the separation between culpable and fraudulent is not clear cut. What was suggested in para. 11 *supra* would not be applicable to fortuitous bankruptcy for, in such a case, a clear discharge should be given; nor would it be likely to have much effect in the case of the fraudulent person though that would not be a reason for not trying it experimentally. But in the case of the culpable bankruptcy it might well have some influence. It should apply to the fraudulent bankrupt in addition to punishment for a bankruptcy offence.

50. The provisions relating to discharge as contained in the Law of South Africa are of interest in view of the fact that that system of law has roots in both Roman and English law. Section 124 deals with Applications for what is called "rehabilitation" in that system (and minimum periods of one to 5 years are laid down, according to the type of bankruptcy, which must elapse before a discharge can be granted. These are quite contrary to what was suggested in para. 9 (*supra*).

On the other hand by S.127 of the Canadian Bankruptcy Act, bankruptcy does operate as an application for discharge, unless the bankrupt serves notice of waiver (as in the American practice). This is thought to be the preferable system by the writer.

51. Relation - back - The system advocated in paras. 15-16 *supra* is to be found in Canadian law in Section 41 (4) which provides that the bankruptcy shall be deemed to have relation back to and to commence at the time of the filing of the petition in which a Receiving Order is made, (or if the filing of an assignment with the official receiver). As a corollary, there are Sections 60 to 67 which deal with the avoidance of settlements and preferences in addition to Sections 40 and 41 which stay proceedings and executions. This is the method advocated in the first memo submitted.

52. Fraudulent preferences: the English system whereby a payment is not a fraudulent preference if made under pressure needs revaluation because it puts a premium on harshness in creditors and possibly encourages collusion. The test should be insolvency at the date of the payment.

53. Set-off. The rules of set-off in bankruptcy are unjust in giving payment in full to those creditors who have had the luck to have mutual dealings in preference to those who have not. The law should require payment in full of debts due to the debtor, and give only a dividend to the creditor on his own claim to put everyone on an equal footing. Set-off in bankruptcy should be abolished.

54. Exemptions. It is surprising how great is the disparity in legal systems of different countries between the various provisions exempting property from seizure by process of law including bankruptcy. Continental systems tend to favour much detailed description of what items may be retained. Such things as military equipment, religious symbols, wedding rings and the like are commonly found listed as exempt. One cow, or three sheep or two goats with forage for a month are common. One useful provision, lacking in English law, is the books of the profession or calling of the debtor (up to 20,000 francs in French law at the moment, the items to be selected at the debtor's choice). Separately the debtor may retain machines and instruments of his trade, science or art up to the same amount. No limit of money is put on an additional exemption in favour of the tools of trade of an artisan. Clothes and food for a month for the debtor and his family are also allowed.

There is usually a narrower allowance in the case of bankruptcy than in the case of execution.

Australian law has rather detailed provisions for bankruptcy exemption in S.91 including exemption for a sewing machine. Tools are limited to hand tools but the limit of Fifty pounds does not apply to the whole of the things exempt, only to the tools.

Perhaps a system where what is exempt is stated in general terms with an overall figure of maximum value for the items exempt is as workable as detailed provisions, but in that case the figure should reflect modern values. Nevertheless if there is to be any description then there is a value in comprehensiveness. For example it has been laid down that in Scotland the professional books are not exempt because they are not tools of trade. This is hardly a satisfactory rule.

55. Homestead exemption. Typical of this is the law of Illinois a summary of which is attached.
56. Reputed ownership. What was said (supra, para. 27 et seq.) about reputed ownership and (in para. 33) about registration of settlements not defeasible on bankruptcy was meant to suggest that the doctrine might well be repealed with greater justice. Further support for this view is to be found in the fact that reputed ownership does not apply to limited companies (Gerringe v Irwell Rubber Co. (1886) 34 Ch.D.128 C.A.). It cannot be true that this is because a search reveals the amount of paid up capital. Even if creditors took the trouble to search it would be of little guide. How has the capital been spent, and how have the acquired assets been preserved—are more important questions, and this requires inspection of the premises. Such inspection might be deceptive because of the presence of the goods of third parties, yet reputed ownership does not apply to protect the deceived creditor who goes to that trouble. Why should it be necessary elsewhere?
57. Priorities. These need restating in English law. Other systems tend to be more detailed and to have more grades of priority. The writer would prefer to see the minimum number of grades for greater equality. It is interesting to observe that in Australian law, wages and compensation for injury (up to £200) for employees, take preference over taxes. There are 8 grades in that legal system (see S.84).
- South African law is also very detailed in its priority provisions in Sections 96-103.
- Canadian law, by Section 95 has a scheme well worth inspection. The landlord's position is dealt with very simply by para. (2).
58. Compositions. The rules concerning compositions are set out in good detail for Australia in ss. 157-188. It seems by s.72 that the trustee is intended to have the full powers of a trustee in bankruptcy, the words "so far as the terms of the composition or scheme admit" not being considered to be unduly limiting.
59. Fraudulent conveyances. This most important matter needs full treatment in place of the skimpy S.172 of the L.P.A. In America there is a separate Act of some 15 sections which any State may adopt. I take the liberty of attaching a copy for handy reference as I believe English Law would be much the better for similar provisions.

(Sgd.) L. W. Melville.
27th July, 1956.

APPENDIX A

Exemptions for Homesteads under Illinois Law

Every householder having a family has an estate of homestead in land and buildings thereon owned or possessed by lease or otherwise and occupied as residence which is exempt from attachment levy or sale up to \$1000.

If creditors believe homestead is worth more than \$1000 Sheriff must summon 3 commissioners to appraise property: if it can be divided without injury they must set off so much including dwelling house as is worth \$1000 unless debtor pays excess within 60 days; if not, premises sold and out of proceeds \$1000 paid to debtor.

These exempt proceeds of \$1000 are themselves exempt for one year and may be reinvested in new homestead.

No limitation of area.

No exemption as to taxes or assessments or liabilities for purchase or improvement thereof.

No need to register exemption publicly.

Waiver of exemption by husband does not bind wife.

Conveyance of homestead must be in writing signed by householder and his or her husband or wife.

Exemption continues at death for successor whilst living therein for benefit of children until youngest is 21.

In case of divorce, the divorce court disposes of homestead according to equities.

APPENDIX B

Uniform Fraudulent Conveyance Act

S.1 Definition of terms: In this Act "Assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property and also the creation of any lien or incumbrance.

"Creditor" is a person having a claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

"Debt" includes any legal liability whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

S.2 Insolvency (1) A person is insolvent when the present fair saleable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured. (2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair saleable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair saleable value of the assets of such limited partner is probably sufficient to pay his debts including such unpaid subscription.

S.3 Fair consideration: Fair consideration is given for property or obligation:

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

S.4 Conveyances by insolvent - Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

S.5 Conveyances by persons in business - Every conveyance made without fair consideration when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors, and as to other persons who become creditors during the continuance of such business or transactions without regard to his actual intent.

S.6 Conveyance by a person about to incur debts. Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation, intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

S.7 Conveyances made with intent to defraud. Every conveyance made and every obligation incurred with actual intent as distinguished from intent presumed in law to hinder delay or defraud either present or future creditors is fraudulent as to both present and future creditors.

S.8 Conveyance of partnership property. Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors if the conveyance is made or obligation is incurred.

(a) To a partner whether with or without a promise by him to pay partnership debts or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

S.9 Rights of creditors whose claims have matured - (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser:

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

(2) A purchaser who, without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

S.10 Rights of creditors whose claims have not matured - Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may

(a) Restrain the defendant from disposing of his property

(b) Appoint a receiver to take charge of the property

(c) Set aside the conveyance or annul the obligation

(d) Make any order which the circumstances of the case may require.

S.11 Cases not provided for in the Act - In any case not provided for in this Act the rules of law and equity including the law merchant and in part the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern.

S.12, 13, and 14 Not of interest.

A. JURISDICTION

It is submitted that the present system whereby the County Courts have, within their respective districts, co-ordinate jurisdiction with that of the High Court within the London bankruptcy district (See Bankruptcy Act, 1914, 55, 98, 99), leads to inconsistencies which are very undesirable.

2. With certain outstanding exceptions, neither Judges nor Registrars of County Courts are well versed in bankruptcy law, and it is most unusual for them, in matters within their discretion (such as the adjournment of petitions and the suspension of discharges), to make any attempt to bring their practice into line with that prevailing in the High Court or (for that matter) in other County Courts.

3. In most County Courts having bankruptcy jurisdiction, the annual number of bankruptcy cases is small, and their experience and standards of comparison are correspondingly sparse. The tendency is, therefore, to lack a sense of proportion; with the result that comparatively small bankruptcies are often, but by no means consistently, treated with a severity reserved in the High Court only for cases of the most discreditable kind.

4. Another feature which tends to distinguish the quality of justice meted out by County Courts sitting in bankruptcy from that to be enjoyed in the High Court, is the different division of functions as between the Judge and the Registrar. The respective duties and powers of the High Court and County Court Registrars are to be found set out in S.102 of the Bankruptcy Act, 1914, from which it follows by inference that matters reserved to the Judge in the County Court are wider in extent than those reserved in the High Court. Nevertheless, it is commonly the case that the County Court Registrar is better versed than his Judge in bankruptcy law. Where this is not so, it may happen that neither of them has much practical experience of handling bankruptcy cases at all.

5. The framers of the nineteenth century legislation from which the County Courts have derived their jurisdiction in bankruptcy, do not seem to have taken into account that bankruptcy law is a highly specialised subject, of which few lawyers in either branch of the profession have more than some superficial knowledge. Since it affects status and commercial and moral reputation, it is a matter of such importance to the public, that they ought, it is submitted, to have placed its operation exclusively in the hands of specialists. It is no doubt necessary to bear in mind that even taking bankruptcy and companies winding-up together, the amount of business in the courts will not normally justify a wide degree of specialisation or support a large personnel exclusively devoted to it. But the answer is hardly to be found in making use of machinery, just because it is available at virtually no extra cost, which is ill adapted for the purposes of justice in this sphere.

6. The simple solution here proposed seeks to meet the objection while having due regard to the need for reasonable economy.

7. In the first place it is submitted that companies winding-up is more closely related to bankruptcy than it is to company law as a whole. It would be both reasonable and economical to detach jurisdiction in winding-up from the Companies Court and to amalgamate it with bankruptcy in a court which might conveniently be called the Insolvency Court.

8. The offices of Bankruptcy and Companies Registrar should cease to exist as such. The relative functions should all be vested in the Insolvency Judges, shortly to be mentioned.

9. The Board of Trade should provide the necessary officials to act as Court Registrars, charged with the usual duties of keeping the records and (when required to do so) assisting the Court in matters of procedure and the like.

10. There should be a small number of Insolvency Judges, sitting exclusively in insolvency matters. Such matters would cover everything which now falls within the jurisdiction of Judges, whether of the High Court or of County Courts, sitting in Bankruptcy or Companies Winding-up as well as those matters which are now dealt with by the Registrars, whether in court or in chambers. Provision might be made, if the pressure of work should warrant it, for the delegation to Court Registrars (subject to adjournment, on request, to the Judge) of such matters as applications for routine adjournments, the fixing of dates or the like.

11. How many Insolvency Judges it will be necessary to appoint will depend on the volume of work to be dealt with. The proposal is that say, two will sit in London, while the rest (at first probably not more than two or three) will go on circuit throughout England and Wales. To judge by the small volume of work in insolvency being dealt with at present outside London, it would be neither necessary nor expedient to dissipate the centres of jurisdiction as widely as at present. Some dozen or twenty centres, at the most, apart from London, might be found to be quite adequate; and as the Court would technically be one and the same, wherever it happened for the moment to be sitting, really urgent matters could always follow one of the Judges to the most nearly accessible centre. By staggering the Judges' vacations, the Court could be in perpetual session.

12. The question of accommodation would call for some attention. Ideally, there should be a special Insolvency Court in each centre; and that should be the ultimate objective. Meanwhile, however, arrangements will have to be made to use other available courts. If the centres are situated in assize towns, the Assize Courts will often be found available so long as the dates for sittings are suitably arranged. It may, however, be found more practicable to avoid assize towns, and to make use of local courts on which there are less exacting demands. In any event, the Board of Trade will need to establish an office for their Insolvency Personnel in each centre on a permanent basis, for dealing with the files and with routine business. Since the proposal is to limit the number of centres to the minimum, and to work the system as flexibly as possible, the choice of centres should be governed primarily with an eye on their accessibility both by public transport and by road.

13. The advantage claimed for this proposal is that a highly specialised branch of the law will thus be dealt with (and developed) by specialists from whom a high degree of uniformity may be expected. To enhance this, it is further proposed that there shall be a President (or Chancellor) of the Insolvency Court appointed from amongst the Judges, who will take such steps as he may from time to time consider necessary to co-ordinate the practice of the Court, particularly in matters of judicial discretion.

14. By way of further concentration of specialised jurisdiction, it is tentatively suggested for consideration that appeals from Judges at first instance might lie, instead of to the Court of Appeal, to a Bench of Insolvency Judges, consisting of at least three members (or two for interlocutory appeals) and not including the Judge from whom the appeal is made. From this authoritative body, a final appeal might lie, with leave, directly to the House of Lords.

15. If this should be regarded as too startling an innovation, then it is suggested that all appeals should go directly to the Court of Appeal, and thence, with leave, to the House of Lords.

16. With such a system in operation, it is anticipated that the dispatch of all business in insolvency should be rapid, uniform and just, to the benefit of the community in general and the trading community in particular.

17. The object of this provision of the law is to correct the consequences of a debtor's prejudicing some of his creditors deliberately by paying another or others ahead of them.

18. The traditional method of achieving that is simply to compel the favoured creditor to repay what he has received to the trustee or liquidator.

19. The approach is first to find a voluntary intent to prefer (which the law stigmatises as "fraud") in the mind of the debtor, and upon that to take adverse proceedings against the creditor, notwithstanding that the creditor's own intentions in the matter are prima facie irrelevant.

20. The creditor is presumed to intend to secure repayment of what is owing to him; and since he owes no duty to other creditors, there is nothing "fraudulent" in his doing what he can to obtain it. But although what he intends is thus beside the point, what he chooses to do is not. For what the creditor does may well affect the intent with which the debtor pays him. It may, by the threats with which it is accompanied or the hopes of future benefit which it may arouse, so change the debtor's motive as regards his other creditors as to deprive it of any voluntary character. Thereupon, the payment is deemed to be purged of its potentially "fraudulent" character.

21. Plausible as this argument can be made to sound, the result of it has been, when worked out in practice, that the more ruthless, selfish and unscrupulous the creditor can show himself to have been, the stronger he can make his case for keeping what he has extracted from the debtor. On the other hand, the creditor who has really been virtually defrauded into giving credit to a man who knew himself (although the creditor did not) to be hopelessly insolvent, will be compelled to pay back what the debtor, moved by conscientious scruples, pity or gratitude, has chosen to repay him.

22. Yet it is not the policy of the law to bring about such consequences. What the law is concerned to do is to see that no one shall contrive to upset deliberately the equal distribution of an insolvent estate. That it is possible to contrive such inequality in anticipation of insolvency proceedings is notorious. Some method, therefore, of attacking past transactions directed towards this end is essential. The problem is to find one which will achieve that result without at the same time working injustice.

23. Where the law has, as it were, gone off at a tangent, is in its concentration on the mind of the debtor - as though that were the only motive force capable of bringing about an unequal distribution of the assets. If it were to be said in defence of that concentration that the debtor's mind is at any rate the only motive force legally bound to bring about an equal distribution, then one is reduced to a certain absurdity. Whereas the party against whom the remedy has to be sought is the creditor, the cause of action arises, not out of anything for which the creditor is to be blamed, but out of a wrongful motive in the mind of the debtor, a third party not before the court! More absurdly still, the nature of the proceedings is such that, as a rule, neither party is in possession of admissible evidence to prove the one fact (the intent of the debtor) on which the whole issue falls to be decided.

24. Such a situation offends against two cardinal principles of justice. First, that a party seeking a remedy should do so against him who has invaded his rights; and secondly, that any party against whom it is essential to prove an allegation should be before the court. No amendment, it is submitted, of the law relating to "fraudulent preference" (and it has long since been cogently urged that it would be better termed "voidable preference") will really be an improvement on the present position unless full regard is had to the application of those two

principles. A fundamental change is accordingly called for which must result in what look, at first sight, like somewhat complicated and startling innovations.

25. Once, however, it has been accepted that the voidability of a preference should depend on the conduct of the creditor and not on the intention in the mind of the debtor, what is about to be proposed is really quite simple. The suggested scheme may be conveniently summarised as follows:-

- (1) Whenever a debtor gives an advantage to a particular creditor (or to a surety or guarantor for his debt to that creditor), he gives a preference.
- (2) A preference, as such, is not necessarily objectionable, but becomes prima facie voidable if bankruptcy supervenes within a certain time after it has been given.
- (3) Its voidability then depends on the circumstances in which the creditor has procured or accepted the preference.
- (4) The trustee only has the burden of proving facts relating to the creditor's knowledge, actual or presumable, of the debtor's circumstances.
- (5) It will be for the creditor thereupon to bring the case within one of the categories in which a preference is justifiable.
- (6) Although the intention of the debtor will make no difference to the respective rights of the trustee and the creditor, a debtor who is in fact blameworthy will not escape unscathed. The trustee will be able, in the preference proceedings, to secure against the debtor a full exposure of his misconduct, with consequential findings of fact that will toll against him when the time comes for his discharge to be considered.
- (7) So far as guarantors and sureties are concerned, the existing position should remain unchanged. The action will lie against the preferred creditor, who will have to take the consequences of the misdeeds of the guarantor, subject to his right over, and his remedy in third party proceedings.

26. It will be noticed that what will avoid a preference (assuming bankruptcy to have supervened within the time limited) will, in the first instance, be the creditor's knowledge of the debtor's position. It is submitted that a creditor should not be permitted, let alone encouraged, to press for an advantage when he knows or has good reason to suspect that bankruptcy is imminent. He should not even be entitled passively to accept payment. Once he has as much as been put on inquiry, he should take the money only at his risk.

27. On the other hand, the innocent creditor who was tricked into parting with his money by a debtor who has since repented and has sought to make amends, should (subject to being able to establish those facts) be entitled to keep what he has recovered. So it is submitted, ought a creditor who genuinely tried to help the debtor to keep his head above water, as well as several other classes of creditor in respect of transactions which the present law protects from impeachment.

28. Indeed, although this does not strictly fall within the scope of "fraudulent preference", it is suggested that the law should go further than merely to allow certain creditors to keep what they have already been repaid. The injustice is patent of the present operation of the law, whereby a debtor who takes from an unsuspecting creditor a delivery of goods on credit on the eve of bankruptcy, thereby makes them assets which pass to his trustee. It is proposed that where such transactions have taken place within the last seven days, and the creditor can establish good faith and ignorance of the debtor's plight, he should have the right to recover his goods by the device of impressing them with a trust in his

favour. Logically perhaps the same principle should extend to loans of money. But there is always the difficulty of identifying cash for such purposes, and it is thought that such an extension would possibly open the door to more mischief than it would serve to avoid.

29. As regards the debtor, it has already been noticed that he will not be left to go scot free. The advantage of being able to join him as a respondent in proceedings against a creditor will be not only to enable the trustee to show him up effectively, but also to expose him to cross-examination in aid of the trustee's case against the creditor. At present the trustee's only weapon is to have the debtor privately examined—and even that not as of right. The result is generally no more than a costly transcript note, which is not available in evidence unless the respondent is rash enough to call the debtor at the hearing, or the trustee, still more rashly, makes him his own witness and hopes to be allowed to cross-examine him.

30. In order to demonstrate how the law would stand were the foregoing proposals to be put into effect, there is annexed by way of an Appendix to this Memorandum a draft of a suggested amended version of S.44 of the Bankruptcy Act, 1914.

(Sgd.) WALTER RAEHURN
July, 1956.

APPENDIX

Draft Re-enacted Version of a Repealed Section 44 of the Bankruptcy Act, 1914

44. (1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by an insolvent person (in this section called "the debtor") in favour of any creditor, or of any person in trust for any creditor, to the advantage of that creditor, or of any surety or guarantor for the debt due to that creditor, over the other creditors of the debtor, shall be a preference within meaning of this section.
- (2) If the debtor is adjudged bankrupt on a bankruptcy petition presented within six months after the date on which a preference was given by him, that preference shall be deemed void as against the trustee in bankruptcy.
- (3) In this section the expression "insolvent" in relation to any person means that such person is unable to pay his debts as they become due from his own money, and the expressions "solvent" and "insolvency" shall be construed accordingly.
- (4) The trustee in bankruptcy shall be entitled to enforce his remedy arising out of the avoidance of a preference against the person (in this section called "the creditor") in whose favour the preference was given, and against the debtor, in the following circumstances, that is to say,
- (a) Where the creditor, or a surety or guarantor for the relative debt, knowing or having reasonable cause to know the debtor to be insolvent, or having notice of an available act of bankruptcy committed by the debtor,
- (i) has procured the debtor to give him a preference, whether voluntarily or in consequence of any threat, promise or other inducement; or

(ii) has permitted the debtor to give him a preference; or

(b) Where the creditor, or a surety or guarantor for the relative debt, has in fact been given a preference in such circumstances (including, where it is the fact, his having without justification been singled out for such advantage) as, in the opinion of the Court, should have put him on his inquiry as to the insolvency of the debtor.

(5) Where a preference has been avoided, the trustee in bankruptcy shall (if the facts so warrant) be entitled, as against the debtor, to all or any part of the following relief, that is to say,

(a) a declaration that the debtor has committed misconduct in relation to his bankruptcy, in that he has conspired with the creditor or with a surety or guarantor for the debt due to the creditor (or as the case may be) to defeat or delay his creditors;

(b) a declaration that the debtor has committed misconduct in relation to his bankruptcy in that he has made a conveyance of property with intent to defraud creditors; and

(c) a declaration that the debtor has given an undue preference to the creditor within the meaning of paragraph (i) of subsection three of section twenty-six of this Act.

(6) Notwithstanding anything contained in this section, a preference shall not be deemed to be void if and so far as it was given to the creditor in any of the following circumstances, that is to say,

(a) where the debtor, having previously defrauded the creditor, has given the preference by way of remedying that wrong;

(b) where, and to the extent to which, the debt or obligation in respect of which the preference was given was incurred in the course of an attempt by the creditor in good faith to assist the debtor to restore his solvency by enabling him to continue in his business;

(c) where the creditor would not have given credit to the debtor had he known that the debtor was insolvent;

(d) where the preference was given by the debtor in the ordinary course of his business dealing;

(e) where the preference was given in good faith in performance of an obligation of the debtor punctually to make payment or to transfer property on or before a particular day, such obligation having been undertaken more than six months before the date of the presentation of the petition on which the debtor was adjudged bankrupt; and

(f) where the creditor has given to the debtor reasonably equivalent value in exchange for and at the same time as or after the giving of the preference.

(7) For the purposes of the last foregoing subsection of this section, the onus of proving circumstances sufficient to save the preference from avoidance shall lie on the creditor, and the motive of the debtor in giving the preference shall be immaterial.

(8) Where within seven days before the date of the receiving order made in the bankruptcy of the debtor, the estate of the debtor is augmented by a delivery of goods made by a person in good faith and without knowledge of the insolvency of the debtor or notice of an available act of bankruptcy, then notwithstanding that the property in such goods shall have passed to the debtor, the trustee in bankruptcy

shall, to the extent to which such goods shall actually have come into his hands or be recoverable by him, be a trustee thereof or of the proceeds of their sale for the person by whom the property in the goods was transferred.

(9) This section shall not affect the rights of any person taking title in good faith and for valuable consideration through or under a creditor of the bankrupt.

(10) Where a receiving order is made against a judgment debtor in pursuance of section one hundred and seven of this Act, this section shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order.

(Sgd.) WALTER RAEBURN
July, 1956.

1. The Committee has invited the Treasury to give its views on the rights enjoyed by the Crown, in common with other legal persons, under Section 31 of the Bankruptcy Act, 1914 and, in particular, comment on a possible amendment to that Section which the Committee has had under consideration. The amendment would read:-

"For the purposes of this Section every Ministry or Department of the Crown shall be deemed to be a separate legal entity".

2. It is understood that the Committee has been much concerned with the effect both of Section 31 and of Section 33(1) on the rights of the Crown as a creditor in bankruptcy cases compared with those of private creditors. The Board of Inland Revenue have commented on Section 33(1) in their memorandum of 8th February, 1956, and we have nothing to add to their observations. The two Sections differ not merely in their importance from the point of view of the Exchequer (Section 33(1) being by far the more important) but in the respective principles behind them. Section 31 lays down the rights of set-off enjoyed by all legal persons concerned with bankruptcy; Section 33(1) deals with the rights of the Crown, among other creditors having prior claims to the available assets and, as the Board of Inland Revenue have pointed out, imposes a restriction on the Crown's claim. The absence of connection between the two Sections is of importance since both may be held, in a loose sense, to have the effect of giving preference to the Crown as creditor. In the view of the Treasury it is important, however, to consider separately the quite different principles of law involved and the possible effects of any amendment of them.

3. The main question addressed to the Treasury is whether the Crown is invariably one and indivisible so far as financial matters are concerned. We think, however, that the fundamental question should be stated in rather different terms. The position of the Crown as the custodian of public funds arises from the principle that it is a single person in the eyes of the law and that individual Departments are its agents. It is difficult to judge the possible repercussions of any departure from this principle, such as has been suggested by the Committee. Without attempting, however, to forecast the view which the Courts might take in whatever case might arise, it can at least be said that any weakening of the principle might well lead to demands for exceptions to be made in other cases.

4. Section 31 of the Act re-enacts a provision originally introduced in an Act of Queen Anne which is based on the principle that where the creditor owes money to the bankrupt debtor, justice is done by subtracting one debt from the other and dealing only with the balance in bankruptcy. If this is held to do justice between debtors and creditors generally two questions arise: first, whether it can be shown that there is good reason for distinguishing between the Crown and other debtors and for putting the Crown into a worse position than other legal persons; and secondly, whether any such distinction is practicable. We do not think that an affirmative reply is possible to either. It is true that the activities of the Crown through the different Departments of State, are more multifarious, taken together, than those of any private concern and that these may lead to the more frequent application of Section 31 by the Crown. The dealings of the bankrupt with the different parts of a large industrial or commercial concern may, however, be as varied as those which he has had with the Crown. We do not see how it is possible in principle to distinguish between the Crown and private corporations in this respect, or between trading and other activities (or between tax debts and other debts) since Section 31 makes no distinction between debts arising from the different types of transaction in which private corporations may have been engaged with the bankrupt. The fact that certain corporations, such as Unilever, may prefer for other reasons to divide their functions between subsidiaries which are separate legal persons should not, in the view of the Treasury, be allowed to affect the consequences arising from the status of the Crown as a single legal person.

5. The division of the functions of the Crown between individual departments is not infrequently altered. Thus, for example, the responsibilities of the Ministry of Supply in the field of engineering were transferred to the Board of Trade. The Board of Trade and a number of other Departments shed certain responsibilities to the Ministry of Materials, which was set up in 1951 but which has now been reincorporated in the Board. In view of such changes the amendment suggested by the Committee might have two kinds of disadvantageous effect from the point of the Crown. Firstly, if a bankrupt has been engaged in a variety of transactions with a single Government Department, from which both debits and credits had arisen, and if as a result of reorganisation, responsibility for any of those involving credits were to be separated Departmentally from that for any of those involving debits, it would no longer be possible to claim offset in respect of those transferred, even though the transfer had occurred since the transactions from which the debits and credits arose. Secondly, it is possible to conceive of two different persons who have had precisely the same dealings with the Crown before and after such a transfer of functions. In the one case offset could be claimed; in the other case it could not.

6. The Committee has invited our comments on the drafting of a suggested amendment to Section 34. We think, however, that questions of drafting can best be dealt with by Parliamentary Counsel if and when particular amendments to the Act are put into the form of legislation.

22nd October, 1956

LETTER RECEIVED FROM
THE NATIONAL UNION OF MANUFACTURERS

6, Holborn Viaduct,
London, E.C.1.

25th October, 1956.

B. Mactavish, Esq.,
Bankruptcy Law Amendment Committee.

Dear Sir,

Bankruptcy Law Amendment Committee

Would you please refer to your letter of the 2nd November, 1955, in which your Committee invited the National Union's views generally on the questions involved in the terms of reference, and also on certain particular matters which were set out in para. 3 of your letter.

We have no substantial views to submit to your Committee on the terms of reference in general. With regard to the matters on which evidence was particularly desired, we wish to submit the following observations:-

- (1) We are agreed that the Bankruptcy Acts need to be amended in regard to the discharge of bankrupts, and agree in toto with the scheme outlined in the Appendix to your letter of the 2nd November, 1955.
- (2) That where there is a second or subsequent bankruptcy, and where the bankrupt remains undischarged from a previous bankruptcy, any assets acquired by the bankrupt after his previous bankruptcy should be applied in the discharge of debts owing to creditors in the second or subsequent bankruptcy, in priority to any debts remaining still outstanding in the prior bankruptcy.
- (3) That the monetary limits proscribed by the Bankruptcy Acts should be increased from the present limit of £50 to, say, £250. This would we believe be of assistance to small debtors and give them an opportunity of clearing their debts.
- (4) That we are in general agreement that the vesting of after acquired property should be limited to such property as may be claimed by the Trustees - though the view has been put to us that the imposition of such limits must depend very much on the circumstances of any particular case.
- (5) That in a non-summary case the creditors should be able to appoint the Official Receiver as Trustee.
- (6) That it would be useful and save expense to the debtor if provision were made for a conclusion of the bankruptcy where the debts are paid in full and a re-vesting of the surplus in the bankrupt, without a documentary transfer by the Trustee.
- (7) That the provisions of Section 51 of the Bankruptcy Act 1914 should be so enlarged as to cover all kinds of earnings, including the wages of workmen.
- (8) With regard to Deeds of Arrangement:-
 - (a) That only professional men belonging to recognized bodies should be appointed as Trustees. It appears that there are so-called accountants and others who engage in this type of work, but who lack professional responsibility, and who may on occasions even "pack" meetings of creditors in order to obtain sufficient votes to secure their own appointment.

(b) That, in a sale of assets, the Board of Trade should demand more concrete evidence of the effective values of these, in order to ensure that they have not been sacrificed for a quick sale.

(c) That six-monthly accounts should be rendered instead of annual accounts, and that the form of return should be revised so as to give more information of expenses in particular and of receipts.

(d) That the remuneration payable to Trustees may be too large in view of the present increased value of assets realised.

We must tender our apologies for the delay in submitting our views, but trust that these will be of some help to your Committee. If it is not now too late, and if your Committee would like to discuss any points with us before finalising their recommendations, we would be pleased to arrange for our representatives to appear and to give oral evidence.

Yours truly,

(Sgd.) V.I. ROBINS
